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Exposure to Family Violence in Hague Child Abduction Cases

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ABSTRACT

The Hague Convention on the Civil Aspects of International Child Abduction requires signatory countries to hold prompt hearings for the return of wrongfully removed children back to their habitual residence. There are five defenses to return provided in the Convention. For taking parents escaping domestic violence with their children, the most typical defense offered to defeat a return petition is "grave risk of harm." Courts vacillate on whether exposure to family violence amounts to a grave risk to a child. Further, some courts require consideration of "ameliorative measures" in an effort to repatriate children to abusive households, instead of denying a return. However, the body of social science literature studying the effects of exposure to family violence underscores the profound harm to children who are witness to family abuse and belies any safety measures concocted to return them to the situs of harm. Accordingly, the Convention and its implementing legislation should be amended to include language which contemplates the damage to a child exposed to family violence and courts should not be mandated to devise methods to return them to the abusive environment.

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INTRODUCTION

In 1980, the global community came together to address the growing incidence and concern over international parental child abduction. This unified effort resulted in the Hague Convention on the Civil Aspects of International Child Abduction (the Convention). To date, over 100 countries have signed the treaty. A central goal of the Convention is to promptly return internationally parentally abducted children back to their "habitual residence." However, there are cases when the parent who abducts the child does so to escape family violence. In some of those cases, the abducted child was not the target of abuse, but was, instead, exposed to a violent household. In cases where family violence was a motivating factor for removal, the taking parent may assert the affirmative defense that returning the child to the habitual residence would subject the child to a grave risk of harm or an intolerable situation. "Grave risk" is not defined in the Convention, leaving the definition and subsequent application open to interpretation. Consequently, the "grave risk" defense has a mixed history of success, especially when the abducted child is "merely exposed" to family violence rather than being the target of abuse, despite the amassed literature concluding that children exposed to family violence are victims of that abuse and bear the scars for a lifetime. Courts worldwide are still divided on whether "mere exposure" can form the basis for a successful grave risk defense. Accordingly, some children who were removed from a violent household are ordered to return to that dangerous situation. To address this possibility of danger upon return, some courts order protective measures, known as "undertakings," to ensure the safety of the returned child. However, these orders are mostly ineffective. It is for this reason that a growing community, comprised of academics, social scientists, attorneys, and advocates, is calling for an amendment to the foundational documents of the Convention to include exposure to family violence as a grave risk defense and to eliminate the mandate for courts to consider ameliorative measures before denying a return.

I. THE CONVENTION: PROCEDURES, ELEMENTS, DEFENSES, AND UNDERTAKINGS

The Hague Convention on the Civil Aspects of International Child Abduction is designed to "protect children internationally from the harmful

effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."[1] The International Child Abduction Remedies Act (ICARA) is the implementing legislation for the Convention in the United States.[2]

A. Procedures, Elements, and Defenses

The process for initiating a Hague case is straightforward. However, litigation can be complicated because the terminology in the Convention is specialized. To understand the law and its application, it is important to become familiar with the specialized vernacular used in the Convention: (a) the parent from whom a child was removed is referred to as the "petitioner" or the "left-behind parent"; (b) the parent who removed or retained the child is the "respondent" or "taking parent"; (c) a wrongful removal or retention must be from the child's "habitual residence" which, presumably, is the country from where the child was removed;[3] and (d) the state where the child is located is referred to as the "removal state."

The initiation of a case under the Convention begins with an application either for return[4] or for access.[5] Access petitions are used by left-behind parents who are not seeking to return the child to the habitual residence, but who want "access" to the child in the removal state, akin to a parenting time request.[6] This paper will only focus on petitions for return.

The application for return includes information relating to the parents, the child, the custodial situation at the time of the wrongful removal or retention,

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[1] Hague Convention on the Civil Aspects of International Child Abduction, opened for signature Oct. 25, 1980, T.I.A.S. No. 11, 670 (entered into force Dec. 1, 1983) [hereinafter Hague Convention].

[2] International Child Abduction Remedies Act, 22 U.S.C. § 9001 et seq. The Convention is international in scope. Therefore, approaches to practice and application of case law are also international. However, this Article examines the topics herein from the perspective of a practitioner in the United States.

[3] Habitual Residence is not defined in the Convention and its interpretation has been the subject matter of several opinions. However, the United States Supreme Court recently held that "a child's habitual residence depends on the totality of the circumstances specific to the case" and that "[a]n actual agreement between the parents is not necessary to establish [a child's] habitual residence. *See* Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020).

[4] Hague Convention, *supra* note 1, art. 8. The Convention refers to the initial request as an "application," while ICARA refers to the initial request as a "petition." 22 U.S.C. § 9003(b). This Article will use the terms interchangeably.

[5] Hague Convention, *supra* note 1, art. 21.

[6] Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494 (Mar. 26, 1986) [hereinafter Text and Legal Analysis].

and the circumstances of the removal or retention.[7] The petition may be supplemented with a number of exhibits, including birth certificates, judicial orders, and information supporting the allegations of the petition.[8] The petition is submitted to the Central Authority in the habitual residence or "to the Central Authority of any other Contracting State."[9] The Central Authority in receipt of the return application communicates the petition to the Central Authority in the removal state.[10] The Central Authority for the United States is the U.S. Department of State, Office of Children's Issues (OCI).[11] When the OCI receives the petition from the habitual residence or left-behind parent, the OCI determines the child's location and welfare, potentially seeks a voluntary return of the child, and helps the left-behind parent locate counsel.[12] The petition may be filed in the local family court or in the federal district court where the child is located, as state and federal courts have concurrent jurisdiction in Convention cases.[13] Further, petitions for return may be directly filed with either a state or federal court, bypassing the Central Authority altogether.[14] The date the petition is filed with the court is the "commencement" date under the Convention.[15] The commencement date is important for determining whether the "well-settled" defense is available to the taking parent.[16]

The Convention has several requirements that must be met before a petition is heard. First, the Convention only applies to a child who is under sixteen years old.[17] If the child turns sixteen while the hearing on the petition is pending, the

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[7] Hague Convention, *supra* note 1, art. 8.

[8] Under the Convention, any exhibits attached to the Petition are received into evidence. Accordingly, it is good practice to attach as many documents as possible in support of the petition at the time the application is submitted to the Central Authority to forestall potential evidence exclusion at trial. Hague Convention, *supra* note 1, art. 30; *see also* 22 U.S.C. § 9005.

[9] Each contracting state under the Convention must establish a Central Authority. The Central Authority is the organization tasked with the administration of incoming and outgoing petitions. Hague Convention, *supra* note 1, arts. 6–8; *see also* 22 U.S.C § 9006(b).

[10] Hague Convention, *supra* note 1, art. 7.

[11] 22 C.F.R. § 94.2 (2021); Hague Conference on Private International Law [HCCH], https://www.hcch.net/en/states/authorities/details3/?aid=133 (last updated Aug. 27, 2020).

[12] 22 C.F.R. § 94.6 (2021). The OCI also communicates with the habitual residence Central Authority and performs other monitoring tasks related to the petition for return. *Id.*

[13] 22 U.S.C. § 9003(a).

[14] Hague Convention, *supra* note 1, art. 29. Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a left-behind parent may not have a need to rely upon the Convention for return if he has an existing custodial order which comports with the requirements of the Act. Text and Legal Analysis, *supra* note 6, at 10,508.

[15] 22 U.S.C. § 9003(f)(3).

[16] *Id*.; Hague Convention, *supra* note 1, art. 12.

[17] Hague Convention, *supra* note 1, art. 4.

Convention no longer applies and the petition for return must be dismissed.[18] Next, the Convention requires a petitioner to establish, by a preponderance of the evidence, three elements to form a prima facie case for return: (1) a child was wrongfully removed/retained from his habitual residence; (2) the left-behind parent is a person with a right of custody; and (3) the left-behind parent was actually exercising his right of custody prior to the wrongful removal/retention, or would have been exercising his right of custody, but for the removal/retention.[19] If the petitioner satisfies elements and burdens imposed by the Convention, the removal court must issue an order of return to the habitual residence.[20] However, the respondent may raise any of five available, but narrowly applied, defenses:[21]

Article 12	well-settled proven by a preponderance of the evidence[22]
Article 13(a)	consent/acquiescence proven by a preponderance of the evidence[23]
Article 13(b)	grave risk/intolerable situation proven by clear and convincing evidence[24]
Article 13	mature child objection proven by a preponderance of the evidence[25]
Article 20	protection of human rights and fundamental freedoms proven by clear and convincing evidence[26]

Even if a defense is established, the court retains the discretion to order the return of the child to the habitual residence.[27] The defense most commonly raised by taking parents fleeing from abuse is under Article 13(b)—the "grave risk" defense.

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[18] Text and Legal Analysis, *supra* note 6, at 10,504.

[19] 22 U.S.C. § 9003(e)(1).

[20] Hague Convention, *supra* note 1, art. 12.

[21] 22 U.S.C. § 9001; JAMES D. GARBOLINO, THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES 88 (2d ed. 2015).

[22] 22 U.S.C. § 9003(e)(2)(B).

[23] *Id*.

[24] *Id.* § 9003(e)(2)(A).

[25] *Id.* § 9003(e)(2)(B).

[26] *Id.* § 9003(e)(2)(A).

[27] Hague Convention, *supra* note 1, art. 18.

B. Grave Risk Defense and Domestic Violence

Grave risk must be established with clear and convincing evidence.[28] However, "subsidiary facts need be proven only by a preponderance of the evidence."[29] Generally, the grave risk defense is raised in two scenarios:

> (1) where the return of the child would send him or her to a zone of war, famine, or disease; and (2) in cases of extreme abuse, neglect, or emotional dependence, and the court in the state of habitual residence is unable or unwilling to provide the child with the necessary protection.[30]

However, the defense does not serve the best interests of the child.[31] The text of the defense does not provide clear direction regarding situational applicability. Article 13 states, in relevant part:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
> . . .
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.[32]

When separated into its elements, Article 13(1)(b) contains three different types of grave risk that the return would expose the child to—physical harm, psychological harm, or an intolerable situation.[33]

Each type of risk may be raised independently of the others as a defense to prevent the return of the child to their habitual residence.[34] Nowhere is the use of the defense more fraught, however, than when it is applied to situations

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[28] 22 U.S.C. § 9003(e)(2)(A).

[29] Danaipour v. McLarey (*Danaipour II*), 386 F.3d 289, 296 (1st Cir. 2004).

[30] Lauren Cleary, *Disaggregating the Two Prongs of Article 13(b) of the Hague Convention to Cover Unsafe and Unstable Situations*, 88 FORDHAM L. REV. 2619, 2633 (2020). The second clause relating to the habitual residence protection of the child implicates the concept of "undertakings." *See infra* Part IV.

[31] Text and Legal Analysis, *supra* note 6, at 10,510.

[32] Hague Convention, *supra* note 1, art. 13. For a description of the presumed abduction scenarios considered at the time of the drafting of the Convention, see *infra* Part II. This author questions whether the complete absence of considering a taking-parent's flight from abuse may have affected the choice of language in Article 13(b).

[33] HHCH Permanent Bureau, *1980 Child Abduction Convention Guide to Good Practice, Part VI, Article 13(1)(b)*, at 25 (2020) [hereinafter *Guide to Good Practice*].

[34] *Id*. at 25–26.

involving family violence because "courts have not always distinguished among [the discrete grave risk defenses] in their decisions."[35]

1. Definitions

The Convention does not provide definitions of "grave risk" or "intolerable situation." Drafting participants parsed the language of the defense and engaged in extensive dialogue regarding the scope of harm envisaged by it, so as to achieve an expression which captures the intent of the Article.[36] The drafters considered the possibility that a child may not be physically or psychologically harmed at all, but that the harm that befalls the taking parent similarly befalls the child, which would trigger the protections of the Article:

> Moreover, it was necessary to add the words "or otherwise place the child in an intolerable situation' since there were many situations not covered by the concept of 'physical and psychological harm". For example, where one spouse was subject to threats and violence at the hands of the other and forced to flee the matrimonial home, it could be argued that the child suffered no physical or psychological harm, although it was clearly exposed to an intolerable situation.[37]

However, as one member responded, the drafting committee need not "concern itself unduly with such situations [because] [s]ocial workers tended to take different views at different times concerning the rights and wrongs in these matters."[38] Consequently, explicit protection for exposure to family violence was muffled by the vagaries of "intolerable situation."[39] Where the drafters fell silent, the courts spoke.

Defining grave risk requires describing both the risk *and* the harm. The risk must be "more than serious,"[40] and the harm must be "a great deal more than

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[35] *Id.*

[36] HCCH, ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION (1980) TOME III – ENLÈVEMENT D'ENFANTS CHILD ABDUCTION 295–301 (1980), https://assets.hcch.net/docs/05998e0c-af56-4977-839a-e7db3f0ea6a9.pdf.

[37] *Id*. at 300 (regarding comments made by Mr. R.L. Jones, Magistrate of the United Kingdom, on the scope and application of the grave risk defense).

[38] *Id*. (regarding comments made by Mr. H.A. Leal, Q.C., Deputy Attorney General of the Province of Ontario, Toronto).

[39] The hard work of the drafting members necessarily crafted language that would enjoy agreement among the contracting states: "[T]he wording of each exception represents a compromise to accommodate the different legal systems and tenets of family law in effect in the countries negotiating the Convention, the basic purpose in each case being to provide for an exception that is narrowly construed." Text and Legal Analysis, *supra* note 6, at 10,509–10.

[40] Danaipour v. McLarey (*Danaipour I*), 286 F.3d 1, 14 (1st Cir. 2002).

minimal."[41] Considered together, the U.S Court of Appeals for the Second Circuit stated that grave risk includes "situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation."[42] However, the risk of harm need not be immediate.[43] The U.S. Court of Appeals for the Sixth Circuit described the defense as a spectrum:

> First, there are cases in which the abuse is relatively minor. . . . Second, at the other end of the spectrum, there are cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect. . . . Third, there are those cases that fall somewhere in the middle, where the abuse is substantially more than minor, but less obviously intolerable. Whether, in these cases, the return of the child would subject it to a "grave risk" of harm or otherwise place it in an "intolerable situation" is a fact-intensive inquiry that depends on careful consideration of several factors, including the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child caused by its return.[44]

Further, an "intolerable situation" is subjectively defined as "a situation which this particular child in these particular circumstances should not be expected to tolerate."[45]

2. Application

In the United States, there exists a split among circuit courts and, internationally, a schism among contracting countries regarding how to apply family violence factors to the grave risk defense.[46] In gross terms, the division is represented in three generalized approaches and outcomes: (1) if the child is the target of abuse or is harmed during a family violence incident involving the taking parent, then the grave risk defense is likely successful;[47] (2) if the child

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41 Walsh v. Walsh (*Walsh II*), 221 F.3d 204, 218 (1st Cir. 2000).

42 Blondin v. Dubois (*Blondin IV*), 238 F.3d 153, 162 (2d Cir. 2001).

43 *Walsh II*, 221 F.3d at 218.

44 Simcox v. Simcox, 511 F.3d 594, 607–08 (6th Cir. 2007).

45 *In re* D (a child) [2006] UKHL 51, [2007] 1 AC 619 (appeal cases taken from Eng.).

46 *See The Future of the Grave Risk of Harm Defense in Hague Cases*, LAW OFF. OF JEREMY D. MORELEY, https://www.international-divorce.com/grave_risk_harm_defense.htm.

47 *See Guide to Good Practice*, *supra* note 33, at 31 ("[T]hose [situations] that are more likely to put the physical or psychological integrity of the child at immediate risk—are more often found to meet the high threshold set by the grave risk exception."). *See generally Danaipour II*, 386 F.3d 289 (1st Cir. 2004) (holding grave risk defense was met where child had been target of sexual abuse by remaining parent).

merely witnessed or is exposed to domestic violence perpetrated against the taking parent, but was neither the target nor was physically harmed during the domestic violence event, then the grave risk defense is likely not successful;[48] or (3) if the child merely witnessed or is exposed to domestic violence event perpetrated against the taking parent, and was neither the target nor was physically harmed during the event, the grave risk defense *may still* be successful.[49] The most successful domestic violence/grave risk outcome is when the taking parent demonstrates that the child is the target of the left-behind parent's abuse.[50] When the child is not the target of abuse, the success of the grave risk defense becomes uncertain.[51]

An example of where a child was not the target of abuse but grave risk was still found is *Walsh v. Walsh* (*Walsh II*).[52] In *Walsh I*, the trial court found that the left-behind parent maintained a "clear and long history of spousal abuse," was reported to drink heavily, had a violent and unpredictable temper, and repeatedly physically abused his wife and son from a prior marriage.[53] Despite the evidence of abuse, the trial court ordered the children be returned to Ireland, relying upon the fact that the children at issue in the abduction were not the target of abuse.

> The evidence demonstrates that [petitioner] is intemperate and often unkind to his children and that he spanks and slaps them for minor childish infractions, and of course, *there is the constant exposure to verbal and physical conflict within the home.* As regrettable, and indeed reprehensible as this state of affairs may be, it does not furnish ground to deny the petition. Whatever damage long term exposure to such a poisonous atmosphere may cause, the evidence does not reveal an immediate, serious threat to the children's physical safety that cannot be dealt with by the proper Irish authorities.[54]

The trial court also discounted the emotional damage to the children as a result of their exposure to their mother's and half-sibling's abuse: "[T]o the extent that

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[48] *See generally* Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000) (holding grave risk exception was not met where child witnessed abuse of taking parent and was intercepted by gunman during flight from parent but was not a target of abuse); Tabbachi v. Harrison, 2000 WL 190576 (N.D. Ill. 2000) (holding grave risk exception was not met where child witnessed continued abuse of taking parent but was not target of abuse).

[49] *See generally Walsh II*, 221 F.3d. 204 (1st Cir. 2000).

[50] Cleary, *supra* note 30, at 2634.

[51] *Id*.

[52] *Walsh II*, 221 F.3d at 218.

[53] *Id*. at 209–11.

[54] *In re* Walsh (*Walsh I*), 31 F. Supp. 2d 200, 205–06 (D. Mass. 1998) (emphasis added) (citing *Re* HB, 1 F.L.R. 392 (Fam. Div. 1996) (UK); K v. K, 3 F.C.R (Fam. Div. 1997) (UK); *In re* BAD [1997] 113 M (H. Ct.) (Ir.); *Murray v. ACT* (1993) Appeal No. EA 51 (Austl.)).

the children may be spared both separation from their mother and exposure to their parents' fighting, concerns for their psychological well being [sic] are largely mitigated."[55] The appellate court reversed.

As an initial matter, the *Walsh II* court disabused the notion that the child must face an instant risk to their safety, finding "[t]he Convention does not require that the risk be 'immediate'; only that it be grave."[56] Thereafter, the court recounted the years of abuse suffered by respondent, analyzed the nature of petitioner's violence and its effect on the children, and considered the mounting social science literature describing the reality that "serial spousal abusers are also likely to be child abusers."[57] Based upon the foregoing, the appellate court concluded that the trial court "underestimated the risks to the children" and, therefore, applied the Article 13(b) exception and denied the return.[58]

By contrast, despite a child's exposure to domestic violence in *Garcia v. Duarte Reynosa* (*Garcia III*), the court ordered return of two young children to Guatemala.[59] In *Garcia III*, during the six years leading up to the abduction, the left-behind parent reportedly physically assaulted respondent several times during drunken rages.[60] In one instance, the left-behind parent ran after respondent, shooting a gun into the air while respondent, who was holding the couple's baby, fled.[61] During one of the physical assaults, the older child, then five-years-old, begged her father to stop beating her mother.[62] The child was described as "scared and crying" during the incident.[63] When respondent sought and obtained a restraining order, petitioner violated its terms by visiting respondent in her sister's home and asking her to return to him, which she did.[64] The court found respondent's testimony regarding the descriptions of abuse to

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[55] *Id*. at 206.

[56] *Walsh II*, 221 F.3d at 218. This distinction is essential to understanding the damage to children caused by the insidiousness of exposure to violence. *See infra* Part II.

[57] *Id.* at 220.

[58] *Id*. at 221.

[59] Garcia v. Duarte Reynosa (*Garcia III*), Nos. 2:19-cv-01928-RAJ, 2020 WL 777247, at *5. (W.D. Wash. Feb. 18, 2020).

[60] *Id.* at *3.

[61] *Id.* at *4.

[62] *Id.* at *4.

[63] *Id.* at *4–5.

[64] *Id.* at *1–2. The psychology of domestic violence survivors is complex and varied. There are myriad reasons why survivors remain in abusive relationships. On average, a survivor makes seven attempts before she escapes an abusive relationship. Further, leaving the relationship is widely considered to be the most dangerous time for a survivor. *See* Sarah LeTrent, *When a Friend Won't Walk Away from Abuse*, CNN, https://www.cnn.com/2013/01/10/living/friend-domestic-abuse (last updated January 10, 2013) (quoting Katie Ray-Jones, president of the National Domestic Violence Hotline); *see also infra* note 126, ¶ 17.

be "highly credible" and "corroborated with other evidence or testimony."[65] Despite that finding, the court issued an order for return, concluding that:

> [T]he abuse was primarily directed at Respondent, not the children. . . . Respondent's only evidence of the risk of physical harm to the children is testimony regarding Petitioner's violent tendencies and her fear that he might harm the children at some point in the future if they upset him. This is insufficient.[66]

The court lamented the "potential for psychological harm to children in cases of spousal abuse[,]" but because a psychological evaluation of the children was not requested or performed, the court found the evidence of grave risk lacking.[67]

These cases exemplify the pervasive inconsistent results of the application of family violence in grave risk cases. This situation prompted the Council of General Affairs of the Hague Conference to publish a *Guide to Good Practice* for grave risk defenses "to promote, at the global level, the proper and consistent application of the grave risk exception[.]"[68] However, the *Guide* itself is internally inconsistent regarding children exposed to family abuse, reflecting the ongoing difficulties for application of grave risk. This disconnect is the topic of concern voiced by Rhona Schuz and Merle Weiner, who urge the drafters of the *Guide* to accord with the social science literature supporting the notion that children exposed to family violence are, themselves, at grave risk of harm.[69] "The . . . language in the proposed Guide . . . , as it stands, undermines the scientifically supported proposition that domestic violence perpetrated against a parent can harm that parent's child, even when the child is not a direct target of the violence."[70] Given the damage done to children who are exposed to violence or live in violent family households, it is worrisome that this defense may fail unless the child is the *target* of the abuse. The inconsistent approaches and differentiated outcomes lead to the conclusion that the language in Article 13 does not adequately address the issues inherent in a family violence scenario and defies the stated objective of the Convention to protect "the primary interest of

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65 *Garcia III*, 2020 WL 777247, at *4.

66 *Id*.

67 *Id.*; see also Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects on International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 349–50 (2002) (warning that the requirement of expert testimony is troublesome as it burdens the litigants, delays the proceedings, and incurs expense to the parties).

68 *Guide to Good Practice*, *supra* note 33, at 15.

69 Rhona Shuz & Merle H. Weiner, *A Small Change That Matters: The Article 13(1)(b) Guide to Good Practice*, LEXISNEXIS FAM. LAW (Jan. 21, 2020) https://www.familylaw.co.uk/news_and_comment/a-small-change-that-matters-the-article-13(1)(b)-guide-to-good-practice.

70 *Id.*

any person in not being exposed to physical or psychological danger or being placed in an intolerable situation."[71] Further complicating this issue is the application of "undertakings" by some courts to mediate the return of children to the habitual residence, despite finding a grave risk of harm.

C. Undertakings

Establishing that return of an abducted child would expose him to a "grave risk of physical and psychological harm"[72] or otherwise place him in an "intolerable situation"[73] does not, by itself, preclude return. The Convention endorses a magistrate's authority to "order the return of the child at any time."[74] A court *may* consider various scenarios under which a child may be safely repatriated to the habitual residence, irrespective of the grave risk.[75] These safety measures are known as "undertakings." Generally speaking, "[u]ndertakings are official promises, concessions, or agreements given to a court" by the left-behind parent[76] who is seeking the return of the child, in response to a grave risk determination by the trial court.[77] There is a split among courts in the United States on whether an undertakings analysis is required.[78] In particular, the U.S. Courts of Appeal for the Second, Third, and Ninth Circuits have held that an undertakings analysis is *required* if the court determines that a grave risk defense has been established.[79] By contrast, the First, Eighth, and Eleventh Circuits specifically reject that mandate.[80]

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[71] Elisa Perez-Vera, *Report of the Special Commission*, *in* Hague Conference on Private International Law 426, 433 (1980) [hereinafter *Explanatory Report*].

[72] *Blondin IV*, 238 F.3d (2d Cir. 2001).

[73] *Explanatory Report*, supra note 71.

[74] Hague Convention, *supra* note 1, art. 18.

[75] Whether an "undertakings" analysis is required as part of an Article 13(b) analysis is in dispute among U.S. courts. *See* James D. Garbolino, *Case Commentary: Blondin v. Dubois (Blondin I), 189 F.3d 240 (2d Cir. 1999), & Blondin v. Dubois (Blondin II), 238 F.3d 153 (2d Cir. 2001)*, FED. JUD. CTR. (Jan. 20, 2016), https://www.fjc.gov/content/310170/case-commentary-blondin-v-dubois-blondin-i-ii.

[76] Some courts question whether the left-behind parent or the taking parent bear the burden of proof for undertakings. *See* Saada v. Golan (*Saada III*), 1:18-CV-5292, 2020 WL 2128867, at *1–2 (E.D.N.Y. May 5, 2020) ("It is not clear in this Circuit whether it is the petitioner's or respondent's burden to establish the 'appropriateness and efficacy of any proposed undertakings'").

[77] James D. Garbolino, *The Use of Undertakings in Cases Arising Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, FED. JUD. CTR. 1 (2016) (arguing that left-behind parents may offer undertakings even if a grave risk finding was not made, to ensure the safe and prompt return of the child).

[78] *See* Garbolino, *supra* note 75, at 1.

[79] *In re* Application of Adan, 437 F.3d 381, 397 (3d Cir. 2006); Gaudin v. Remis, 415 F.3d 1028, 1036–37 (9th Cir. 2005); Blondin v. Dubois (*Blondin II*), 189 F.3d. 240, 249–50 (2d Cir. 1999).

[80] Acosta v. Acosta, 725 F.3d 868, 877 (8th Cir. 2013); Baran v. Beaty, 526 F.3d 1340, 1351 (11th Cir. 2008); *Danaipour II*, 386 F.3d 289, 303–04 (1st Cir. 2004).

1. Second, Third, and Ninth Circuits: Undertakings Analysis Required

The U.S. Court of Appeals for the Second Circuit line of decisions in *Blondin v. Dubois* established the mandatory undertaking analysis.[81] In *Blondin v. Dubois*, the taking parent—the mother—fled from France with her two young children.[82] The left-behind parent—the father—filed for return under the Convention.[83] At trial, the mother asserted three defenses: well-settled, mature child, and grave risk.[84] As to the grave risk defense, the mother alleged that she was subjected to numerous beatings, some of which occurred when she was holding the couple's daughter, resulting in some of the blows landing on the child.[85] During and after her second pregnancy, the father would beat the mother and threaten her life.[86] The mother also alleged that the father wrapped an electrical cord around the daughter's neck and threatened to kill both the daughter and mother.[87] The second child also testified at the hearing, echoing the mother's allegations, stating that the father would hit her with a belt.[88] The district court denied repatriation, relying primarily upon the grave risk defense.[89] The decision was appealed by the father and the appellate court remanded for consideration of undertakings, stating the following:[90]

> The question remaining before us, however, is whether the District Court could have protected the children from the "grave risk" of harm that it found, while still honoring the important treaty commitment to allow custodial determination to be made—if at all possible—by the court of the child's home country.
>
> [I]t is important that a court considering an exception under Article 13(b) take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation.[91]

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[81] There are four cases in the *Blondin* line of decisions. This paper numbers those cases chronologically *Blondin I*–*Blondin IV*. This contrasts with the designation by Hon. James Garbolino in the title of his analysis. *See supra* note 75, at 1.

[82] Blondin v. Dubois (*Blondin I*), 19 F. Supp. 2d 123, 124 (S.D.N.Y. Aug. 17, 1998).

[83] *Id.* at 124.

[84] *Id.* at 127–29.

[85] *Id.* at 124.

[86] *Id.*

[87] *Id*. at 124–25.

[88] *Id.* at 124.

[89] *Id*. at 129.

[90] *Blondin II*, 189 F.3d 240, 250 (2d Cir. 1999).

[91] *Id*. at 248. This holding is referred to as "the *Blondin* rule" throughout the remainder of this Article.

On remand, the district court determined that no ameliorative measures could be taken to ensure the safe repatriation of the children.[92] That decision was also appealed by the father. The appellate court affirmed.[93]

The U.S. Court of Appeals for the Third Circuit followed *Blondin*'s reasoning in *In re Application of Adan*.[94] There, the mother objected to the father's petition to return their daughter to Argentina, citing multiple incidents of physical and psychological abuse against her, and alleging the father verbally and sexually abused their daughter.[95] Without creating a written record or clearly issuing a decision on the mother's grave risk defense, the district court granted the petition for return.[96] The mother appealed.[97] Relying on *Blondin*, the appellate court stated on remand that, "if the [district] Court decides that [the mother] has not satisfied her burden of proving a grave risk of harm and the inability of Argentine authorities to protect the child, [it must] carefully tailor an order designed to ameliorate, as much as possible, any risk to [the child's] well-being."[98]

Similarly, in *Gaudin v. Remis*,[99] the U.S. Court of Appeals for the Ninth Circuit also required an undertakings analysis. In *Gaudin*, the court determined that two boys abducted from Canada should not be returned to their mother in Hawaii because of grave risk of psychological harm.[100] The mother appealed on several grounds, attacking the finding of grave risk and the lack of an undertakings analysis by the district court.[101] The appellate court agreed:

> [E]ven if such a risk existed, the district court erred in failing to consider alternative remedies by means of which the children could be transferred back to Canada without risking psychological harm. Courts applying ICARA have consistently held that, before denying the return of a child because of a grave risk of harm, a court must consider alternative remedies that would "allow both the return of the children to the home country and their protection from harm."[102]

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92 Blondin v. Dubois (*Blondin III*), 78 F. Supp. 2d 283, 294 (S.D.N.Y. 2000).

93 *Blondin IV*, 238 F.3d 153, 168 (2d Cir. 2001).

94 *In re* Application of Adan, 437 F.3d 381 (3d Cir. 2006).

95 *Id.* at 386.

96 *Id.* at 387.

97 *Id.* at 385.

98 *Id*. at 398. Interestingly, the *Adan* court did not require a grave risk determination prior to invoking the *Blondin* rule. *See id.*

99 Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005).

100 *Id.* at 1033.

101 *Id.* at 1035.

102 *Id*. (citing *Blondin II*, 189 F.3d 240, 249 (2d Cir. 1999); *Walsh II*, 221 F.3d. 204, 219 (1st Cir. 2000)).

This line of reasoning has created a two-part test for grave risk cases: (1) is there a grave risk of harm or intolerable situation; and (2) is the habitual residence unable to protect the child upon repatriation? If *either question* is answered in the negative, the child must be repatriated. Despite the *Gaudin* court's conclusion that courts "consistently" engage an undertakings analysis, several courts do not.

2. *First, Eighth, and Eleventh Circuits: Undertakings Analysis Not Required*

The *Danaipour* line of cases in the U.S. Court of Appeals for the Eleventh Circuit were decided after *Blondin* and held that an undertakings analysis is not a mandatory function of the court in grave risk cases.[103] In *Danaipour*, the mother abducted her two daughters from Sweden, believing the girls were sexually abused by their father. The trial court found by clear and convincing evidence that the younger child was sexually abused by the father and ordered that neither child would return to Sweden.[104] The father argued the court must engage in an undertakings analysis for return.[105] The appellate court disagreed, concluding:

> [I]t would seem less appropriate for the court to enter extensive undertakings than to deny the return request. The development of extensive undertakings in such a context would embroil the court in the merits of the underlying custody issues and would tend to dilute the force of the Article 13(b) exception.[106]

The court also specifically rejected the *Blondin* rule for undertakings, holding that "*[t]o the extent that Blondin does stand for such a proposition, we disagree that Article 13(b) requires such findings in all cases*."[107]

The Eleventh Circuit followed *Danipour's* reasoning in *Baran v. Beaty*.[108] In *Baran*, the district court denied a return petition filed by a father seeking return of his son to Australia.[109] The court received evidence of the father's heavy bouts of drinking, which prompted violent behaviors directed toward the mother, frequently in the presence of the children.[110] The court concluded that

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103 *Danaipour II*, 386 F.3d 289 (1st Cir. 2004).
104 *Id.* at 303–04.
105 *Id.* at 292–93.
106 *Id*. at 303 (citing *Danaipour I*, 286 F.3d 1, 25 (1st Cir. 2002)).
107 *Id*. at 303 n.5 (emphasis added).
108 Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008).
109 *Id*. at 1342.
110 *Id*. at 1342–44.

returning the child to Australia would subject him to a grave risk of harm and denied the father's petition.[111] The father appealed, claiming the trial court erred in not considering undertakings.[112] The *Baran* court described, in detail, the origin of undertakings in English law and its role in Hague abduction cases, including the U.S. State Department's guidance on the issue.[113] Thereafter, the court concluded that the district court bore no obligation to seek, consider, or order undertakings to facilitate return of the children.[114]

The U.S. Court of Appeals for the Eighth Circuit agreed with *Danaipour*. In *Acosta v. Acosta*, the court held an undertakings analysis is not a mandatory function under the Convention or ICARA.[115] In *Acosta*, the father filed a petition for the return of the couple's two children to Peru.[116] The mother removed the children to Minnesota after several years of verbal, physical, and emotional abuse by the father, including threats of suicide and homicide.[117] This abuse frequently occurred in the presence of the children, causing the older child to express suicidal ideation and have significant behavioral difficulties.[118] The district court determined that the children would be exposed to a grave risk of harm if returned to Peru.[119] The father appealed, claiming the court erred because the court did not consider undertakings.[120] The appellate court disagreed, stating that in cases of "violent parent[s]" and "abusive spouse[s]," courts are under no obligation to order undertakings.[121]

Based upon the foregoing, it appears that undertakings, like the definition and application of the grave risk defense, are unwieldy, varied, and potentially dangerous to parents and children who are escaping violent situations abroad. Although undertakings were created and are implemented to ameliorate the grave risk of harm to the repatriated child, the position asserted in *Acosta* frames the concern properly: "When a grave risk of harm exists as a result of a violent parent . . . courts have been reluctant to rely on undertakings to protect the

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111 *Id*. at 1342.
112 *Id*.
113 *Id*. at 1349–52.
114 *Id.* at 1352–53.
115 Acosta v. Acosta, 725 F.3d 868 (8th Cir. 2013).
116 *Id.* at 871.
117 *Id*. at 871–75.
118 *Id*. at 872.
119 *Id*. at 871.
120 *Id*.
121 *Id*. at 877 (citing Simcox v. Simcox, 511 F.3d 594, 606 (6th Cir. 2007); Van De Sande v. Van De Sande, 431 F.3d 567, 572 (7th Cir. 2005).

child."[122] This position aptly captures the growing body of literature studying the effects of family abuse.

II. THE SOCIAL SCIENCE OF FAMILY ABUSE

This section focuses on the social science of family abuse. This Article uses the terms "family abuse" and "private abuse" interchangeably to highlight the often-secretive nature of family abuse and the problems attendant to the sequestration of that reality. It is conservatively estimated that as many as 275 million children worldwide are exposed to family abuse in the home.[123] In all likelihood, given the concealment often associated with family abuse, this number is much higher. Many abducting parents seek safety for themselves and their children, not in the country of habitual residence, but transnationally.[124] It is for this reason that the literature studying family abuse must be understood so that it may be properly applied in grave risk cases.

This discussion begins with a brief description of why parents abduct their children, with a focus on international removal. The conversation continues with an examination of the difference between the traditional definition of domestic violence and family abuse. Next, the types of family abuse experienced by children are discussed, distinguishing between direct and indirect maltreatment. This section concludes with the effects of indirect maltreatment on children and the consequence of returning those children to the habitual residence.

A. Why Parents Abduct

When or whether a parent will internationally abduct a child defies a reliable, predictive model. However, there are common risk factors that serve to heighten awareness of a possible abduction.[125] What is clear is that when a child is internationally abducted, the duration of that event lasts much longer than the six weeks expected under the Convention. "According to the [Hague Conference on Private International Law] review of Hague Convention cases from 2015, the United States averaged 208 days to reach a final settlement, compared with a global average of 164 days. . . ."[126] Of great concern, therefore, is who the

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122 *Id*.

123 UNICEF, BEHIND CLOSED DOORS: THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN (2006).

124 Weiner, *supra* note 67, at 277.

125 UNIF. CHILD ABDUCTION PREVENTION ACT (UNIF. L. COMM'N 2006). The Uniform Child Abduction Prevention Act is enacted in fourteen states and the District of Colombia, and provides a comprehensive list of pre-abduction risk factors. *Id.*

126 KATARINA C. O'REGAN, CONG. RSCH. SERV., R46553, INTERNATIONAL PARENTAL CHILD ABDUCTION (IPCA): FOREIGN POLICY RESPONSES AND IMPLICATIONS 10 (2020).

abducting parent is and what their motive is for the abduction, all of which factor into the impact on the parentally-abducted child.[127] This is not to say that a parentally-abducted child, even if removed from a dangerous or violent parent, will not suffer the effects of the abduction. It is widely recognized and accepted that the mere act of abduction is traumatic on children.[128]

The Convention drafters generated seven scenarios considered typical of an abduction profile: (1) dissolved or deteriorating marital (or otherwise romantically linked) relationship; (2) significant cultural disparities; (3) dissolved familial relationship excluding one frustrated parent from the life of the child; (4) opportunity arising from visitation; (5) self-help to locate a favorable forum to establish custody; (6) "ambiguous" rationales—that is, no clear reason for the abduction; and (7) child's request.[129] The profiles anticipated that the taking parent would be the non-custodial/non-primary parent who could take advantage of the advances in technology and relaxed international travel controls.[130] None of the above-described scenarios envisaged a parent using international abduction as a *protective* measure by the *primary caretaker*, which causes the Convention to "work[] unjustly in these cases."[131]

In the years since the drafting of the Convention, the profile of the abducting parent has belied the drafter's initial notions, as the taking parent is most commonly the primary caretaker/mother.[132] Further, the multitude of reasons why parents remove their children transnationally are better understood. "Families in which abduction has occurred are likely to have experienced pre-stressors, i.e. stress related to life before the abduction of their child/children. Typical pre-stressors include: separation or divorce, child visitation arrangements and rights, domestic violence, and financial insecurities."[133] Of

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[127] Janet R. Johnston et al., *Early Identification of Risk Factors for Parental Abduction*, OFF. JUV. JUST. AND DELINQ. PREVENTION BULL. (March 2001), https://www.ojp.gov/pdffiles1/ojjdp/185026.pdf (indicating men are more likely to abduct before a child custody order is entered while women are more likely to abduct after an order is entered).

[128] Hague Convention, *supra* note 1, pmbl.

[129] *Actes et Documents de la Quatorzième Session (1980) Tome III,* (referencing Adair Dyer, *Questionnaire and Report on International Child Abduction by One Parent*, Prelim. Doc. No. 1, August 1977, at 19–21). The descriptive categories are a summary of answers provided by governmental entities to questionnaires promulgated by Adair Dyer, First Secretary of the Permanent Bureau. *See id.*

[130] *Id*. at 19.

[131] Weiner, *supra* note 67, at 278.

[132] Adriana De Ruiter, *40 Years of the Hague Convention on Child Abduction: Legal and Societal Changes in the Rights of a Child*, POL'Y DEPT. FOR CITIZENS' RTS. AND CONST. AFFS. DIRECTORATE-GEN. FOR INTERNAL POL'YS., 4, 7–8 (Nov. 2020), https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/660559/IPOL_IDA(2020)660559_EN.pdf (stating that primary caretakers were the abducting parents in eighty percent of cases and mothers represent ninety-one percent of primary caretakers who abduct).

[133] KIM VAN HOORDE ET AL., BOUNCING BACK: THE WELLBEING OF CHILDREN IN INTERNATIONAL CHILD

these "pre-stressors," domestic violence is often asserted as a defense under Article 13(b). This reality was acknowledged in a 2011 Reflection Paper drafted by the Hague Conference on Private International Law Permanent Bureau.[134] Although statistics on how many Article 13(b) defenses premised upon domestic violence are elusive, the Reflection Paper intimated that the issue was prevalent and pervasive enough to merit deeper consideration and study.[135]

This Article presumes the taking parent is the primary caretaker/mother escaping from abuse. This assumption is in no way designed to insinuate that fathers do not flee from abusive partners. However, the overwhelming majority of grave risk cases involve the mother leaving family violence situations as the taking parent.[136] Accordingly, that is the frame used herein.

B. Domestic Violence versus Family Abuse

For purposes of this discussion, the terms "family abuse" or "family violence" are preferred over the more familiar, but less accurate, "domestic violence" (DV), or, interchangeably, interpersonal violence (IPV). DV and/or IPV are traditionally used to connote abuse between intimates.[137] For example, the World Health Organization defines intimate partner violence as "behaviour by an *intimate partner or ex-partner* that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviours."[138] Further, the Centers for Disease Control and Prevention (CDC) describes intimate partner violence as physical violence, sexual violence, stalking, or psychological harm *by a current or former partner or spouse*.[139] This type of violence can occur among heterosexual or same-sex *couples* and does not require sexual intimacy.[140] While

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ABDUCTION CASES 5 (2019).

[134] HCCH Permanent Bureau, *Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child abduction: A Reflection Paper* ¶ 1 (Hague Conference on Private International Law, May 2011) [hereinafter *Reflection Paper*].

[135] *Id*. ¶ 3 (indicating that one study found that "as many of 54% of the relationships in which parental abduction occurred" involved domestic violence).

[136] O'REGAN, *supra* note 126, at 7 ("A HCCH review of Hague Convention cases from 2015 found that 73% of the taking parents were mothers and 58% of taking parents travelled to a country of which they were a citizen.").

[137] Nicholas Bala & Jacques Chamberland, *Family Violence and Proving "Grave Risk" for Cases Under the Hague Convention Article 13(b)*, 91 QUEEN'S L. RSCH. PAPER SERIES 2 (June 15, 2017).

[138] *Violence Against Women*, WORLD HEALTH ORGANIZATION [WHO] (Nov. 29, 2017), https://www.who.int/news-room/fact-sheets/detail/violence-against-women (emphasis added).

[139] *Intimate Partner Violence*, CTRS. DISEASE CONTROL AND PREVENTION [CDC], https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html (last visited Feb. 8, 2022).

[140] *Id.*

there are a myriad of other agencies and organizations with definitions of DV/IPV, they tend to focus on the romantically linked pair. These definitions are narrow and do not encompass the widespread damage incurred by all people who are exposed to abuse from a household or family member.

The definition of family abuse, as proffered herein, however, is designed to reveal the extensive injury resulting from abuse within a family unit. "Family abuse" means the direct infliction of or exposure to physical abuse, verbal abuse, emotional abuse, sexual abuse, or coercive control of any member of a household by a parent or step-parent. This definition is hardly novel, as it has been previously intimated in the context of grave risk. For example, the Reflection Paper acknowledged the internationally-recognized expansive definitions of family abuse to include "physical, psychological and/or sexual" acts directed toward the child, the parent, "or other family members."[141] However, despite—or perhaps because of—these sporadic acknowledgements of the expanded definition of family violence, random, inconsistent, and conflicting applications of these situations are accepted (or rejected) as grounds for finding grave risk to a child. However, this concept of family abuse is purposefully broad because social science supports the theory that families operate as systems.[142]

"Family Systems Theory," as defined in this Article, means that an abuser who targets one member of a family affects the entire family system. This theory holds that the family is an "emotional unit" whose members are "intensely emotionally connected."[143] "People solicit each other's attention, approval, and support and react to each other's needs, expectations, and upsets. The connectedness and reactivity make the functioning of family members interdependent. A change in one person's functioning is predictably followed by reciprocal changes in the functioning of others."[144]

Segregating abuse suffered by one family member from other family members improperly minimizes trauma on the whole family unit by focusing

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[141] *Reflection Paper*, *supra* note 134, ¶ 10.

[142] *See* Terese Glatz et al., *Physical Violence in Family Sub-Systems: Links to Peer Victimization and Long-Term Emotional and Behavioral Problems*, 34 J. FAM. VIOL. 423 (2019).

[143] MICHAEL E. KERR, ONE FAMILY'S STORY: A PRIMER ON BOWEN THEORY (2003). As used in this Article, "Family Systems Theory" does not encompass the therapeutic treatment model. There are legitimate criticisms of applying Family Systems Theory in the context of Family Violence. Among the critiques is that Family Systems Theory implicates the behavior of the abused person within the causation of abuse. Accordingly, Family Systems Theory as a therapeutic treatment construct is outside the meaning used herein. *See* Christina E. Murray, *Controversy, Constraints, and Context: Understanding Family Violence Through Family Systems Theory*, 14 FAM. J.: COUNSELING AND THERAPY COUPLES & FAMS. 234 (2006).

[144] KERR, *supra* note 143.

only on the one who is the target of the abuse. The family systems approach to understanding and intervening in abuse is gaining attention from the legal, medical, and social welfare communities, with a growing chorus of calls for using an integrated framework to understand the abuse dynamics within a family. This refined focus is essential because abusive behavior that occurs within a family "comes at a significant financial cost to the public and families."[145] Further, "[b]ecause the associations between childhood violence exposure and later perpetration or victimization are so strong, the ultimate goal must be family-centered prevention."[146] The Family Systems Theory of abuse echoes the results of the Adverse Childhood Experiences Study conducted by CDC and Kaiser Permanente:

> We found a strong dose response relationship between the breadth of exposure to abuse or household dysfunction during childhood and multiple risk factors for several of the leading causes of death in adults. Disease conditions including ischemic heart disease, cancer, chronic lung disease, skeletal fractures, and liver disease, as well as poor self-rated health also showed a graded relationship to the breadth of childhood exposures. The findings suggest that the impact of these adverse childhood experiences on adult health is strong and cumulative.[147]

However, exposure to family abuse should not be so narrowly defined as to require a child's physical presence where the abuse occurs because hearing abuse while it is occurring or seeing abuse while it is happening can also impact the child. Exposure to abuse includes suffering from the effects of an impacted caregiver—for both the abused parent and the child. Parents with fraught relationships may experience difficulties in parent-child relationships.[148] Although some studies suggest that parents subjected to family violence can moderate their parenting behavior,[149] it is generally accepted that abuse-compromised parenting patterns can include "lower warmth, engagement, and

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145 Gunjan Tiyyagura et al., *Seeing the Forest in Family Violence Research: Moving to a Family-Centered Approach*, 20 ACAD. PEDIATRICS 746, 748 (2020).

146 *Id*. at 749.

147 Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTATIVE MED. 245, 251 (1998); *see also About the CDC-Kaiser ACE Study*, CDC, https://www.cdc.gov/violenceprevention/aces/about.html.

148 Avanti Adhia & Joshua Jeong, *Fathers' Perpetration of Intimate Partner Violence and Parenting During Early Childhood: Results from the Fragile Families and Child Wellbeing Study*, 96 CHILD ABUSE & NEGLECT 104, 103 (2019).

149 Paulo Correia Ferrajao, *The Role of Parental Emotional Validation and Invalidation on Children's Clinical Symptoms: A Study with Children Exposed to Intimate Partner Violence*, 17 J. FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 4, 6 (2020).

communication to increased physical aggression and authoritarian parenting, as well as less positive parenting behaviors, including stimulation, communication, and emotional warmth."[150] The totality of this framework holds that because families operate as systems, children who are exposed to family violence, either as a sensory witness or through a compromised caregiver, are themselves victims of family violence through indirect maltreatment.

C. Types of Family Abuse for Children

For purposes of this discussion, there are two general categories of child maltreatment related to the child abduction analysis: direct maltreatment and indirect maltreatment. Direct maltreatment of a child includes conduct where a parent focuses upon a child as their primary target for physical, verbal, sexual, or emotional abuse. Indirect maltreatment, by contrast, is abusive behavior by one parent directed to another person, typically the other parent, in the child's home. The indirect maltreatment of the child includes exposure to acts of physical violence against a caretaker, acts of emotional or verbal violence against a caretaker, or living in a household with a caretaker who is compromised by the abuse. Indirect maltreatment can also include coercive control. "Coercive control can involve numerous behaviors from perpetrators, including violence, threats, stalking behaviours, continual monitoring, micro-regulation of daily life, emotional, economic and sexual abuse, isolation, denial and manipulation (including by perpetrators sometimes being 'nice' and 'indulgent' to their targets) . . . ."[151] In the United States, it is estimated that sixteen to twenty-five percent of children are exposed to some form of family violence,[152] with fathers being the most common perpetrators of abuse.[153]

Direct abuse of a child is known to successfully support a grave risk defense. The most common example is sexual abuse of a child.[154] Additionally,

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[150] Adhia & Jeong, *supra* note 148.

[151] Emma Katz et al., *When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic Violence*, 29 CHILD ABUSE REV. 310, 311 (2020) (citing V. Enander, *Leaving Jekyll and Hyde: Emotion Work in the Context of Intimate Partner Violence*, 21 FEMINISM & PSYCH. 29 (2011); E. STARK, COERCEIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (2007); E. Stark & M. Hester, *Coercive Control: Update and Review*, 25 VIOLENCE AGAINST WOMEN 81 (2019); E. Williamson, *Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control*, 16 VIOLENCE AGAINST WOMEN 1412 (2010)).

[152] Colleen Henry, *Exposure to Domestic Violence as Abuse and Neglect: Constructions of Child Maltreatment in Daily Practice*, 86 CHILD ABUSE NEGLECT 79, 79 (2018).

[153] Sherry Hamby et al., *Children's Exposure to Intimate Partner Violence and Other Family Violence*, OFF. JUV. JUST. & DELINQ. PREVENTION: JUV. JUST. BULL. (October 2011), https://www.ojp.gov/pdffiles1/ojjdp/232272.pdf.

[154] *See Danaipour II*, 386 F.3d 289, 289 (1st Cir. 2004).

physical[155] and, to a lesser extent, verbal or psychological abuse[156] of the child has also formed the basis for denials of return. However, indirect maltreatment of a child is recognized by the courts as an equivalent level of abuse to direct maltreatment, albeit to a far lesser degree. The following discussion is targeted to dispel that misconception.

D. Effects of Indirect Maltreatment

A bomb may be targeted to a particular site, but all life in the blast radius suffers the impact: this is indirect maltreatment from family violence. "Empirical studies have shown that preschool and school-age children who are exposed to IPV have more emotional and behavior problems, poorer social competence, greater cognitive deficits, and more sensitivity to conflict than children from non-violent homes . . . ."[157] These myriad effects, including school performance, may occur irrespective of the transmission: "witnessing the violence, hearing about it later, or living in the aftermath of the violence . . . ."[158] Therefore, indirect maltreatment has concrete and consequential effects on the child, just as if the child had been subject to direct abuse. Accordingly, this population of children should be recognized for what they are—victims of the abusive parent.

1. Psychological Impact

"Even in the absence of [direct] child maltreatment, it is well established that children who are exposed to IPV are at higher risk of psychological problems, namely posttraumatic stress and depression, compared to children who were not exposed to IPV . . . ."[159] The impact of exposure to trauma in childhood nests itself in the physiology of the child and presents itself in the child's behavior.

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155 *See* Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 461 (D. Md. 1999).

156 *See* Gaudin v. Remis, 415 F.3d 1028, 1037 (9th Cir. 2005).

157 Alissa C. Huth-Bocks & Honore M. Hughes, *Parenting Stress, Parenting Behavior, and Children's Adjustment in Families Experiencing Intimate Partner Violence*, 23 J. FAM. VIOLENCE 243 (2008) (citing J.L. Adamson & R.A. Thompson, *Coping with Interparental Verbal Conflict by Children from Nonviolent Homes*, 13 J. FAM. VIOLENCE 213 (1998); K.L. Kilpatrick & L.M. Williams, *Post-Traumatic Stress Disorder in Child Witnesses to Intimate Partner Violence*, 67 AM. J. ORTHOPSYCHIATRY 639 (1997); T.E. Moore & D.J. Pepler, *Correlates of Adjustment in Children at Risk*, *in* CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES 157–84 (G.W. Holden et al. eds., 1998); K.J. Stemberg et al., *Effects of Intimate Partner Violence on Children's Behavior Problems and Depression*, 29 DEV. PSYCH. 44 (1993)).

158 Lisa R. Kielse et al., *The Relationship Between Child Maltreatment, Intimate Partner Violence Exposure, and Academic Performance*, 10 J. PUBLIC CHILD WELFARE 434, 435 (2016) (citing G.W. Holden, *Children Exposed to Domestic Violence and Child Abuse: Terminology and Taxonomy*, 6 CLINICAL CHILD & FAM. PSYCH. REV. 151 (2003)).

159 Ferrajao, *supra* note 149, at 4–5 (citing A.J. Narayan et al., *Developmental Timing and Continuity of*

> The prevailing view posits that the brain is damaged by excessive exposure to stress, and psychopathology is a direct consequence. An alternative view is that the brain, and the way it processes information, is selectively modified by early stressors 'to facilitate survival and reproduction in what seems, so far, to be a threatening and malevolent world'. . . . Some experiences might be so severe to damage the brain, whereas others can be construed as evolved adaptations.[160]

Either view presents a profile of a child profoundly altered as a result of exposure to trauma. This begs the question as to whether exposure to family abuse is sufficient to code a child as described herein.

Multiple studies have demonstrated a high correlation between an exposure to family violence and children's behavioral dysregulation, including: "externalizing behavior such as aggression and disobedience, and internalizing behavior such as depression, sadness and lack of self-confidence . . . delinquency; emotional and mood disorders; posttraumatic stress symptoms such as exaggerated startle, nightmares, and flashbacks; health-related problems and somatic symptoms such as sleep disturbances; and academic and cognitive problems."[161] While some of these behaviors are short-term, others have consequences that are long-term, such as becoming a perpetrator or victim in adulthood.[162] These manifestations of exposure, while widely accepted, can also vary among studies and cohorts.[163]

2. Educational Impact

In 2016, Lisa Kiesel, Kristine Piescher, and Jeffrey Edleson published the results of their study, which was designed to determine whether—and to what degree—direct child maltreatment, direct child maltreatment plus exposure to

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Exposure to Interparental Violence and Externalizing Behavior as Prospective Predictors of Dating Violence, 25 DEV. & PSYCHOPATHOLOGY, 973 (2013); B. Olaya et al., *Mental Health Needs of Children Exposed to Intimate Partner Violence Seeking Help from Mental Health Services*, 32 CHILDREN & YOUTH SERVS. REV., 1004 (2010); N.L. Vu et al., *Children's Exposure to Intimate Partner Violence: A Meta-Analysis of Longitudinal Associations with Child Adjustment Problems*, 46 CLINICAL PSYCH. REV. 25 (2016)).

[160] Alfonso Troisi, *Childhood Trauma, Attachment Patterns, and Psychopathology: An Evolutionary Analysis*, *in* CHILDHOOD TRAUMA IN MENTAL DISORDERS 125, 134 (G. Spalletta et. al. eds., 2020) (emphasis omitted).

[161] Jeffrey L. Edleson et al., *Measuring Children's Exposure to Domestic Violence: The Development and Testing of the Child Exposure to Domestic Violence (CEDV) Scale*, 30 CHILD. YOUTH SERV. REV. 502, 503 (2008) (citing E.N. Jouriles et al., *Physical Violence and Other Forms of Marital Aggression: Links with Children's Behavior Problem*, 10 J. FAM. PSYCH. 223 (1996); G. Margolin & E.B. Gordis, *Children's Exposure to Violence in the Family and Community*, 13 CURRENT DIRECTIONS PSYCH. SCI. 152 (2004)).

[162] *Id*.

[163] *Id*.

intimate partner violence, or only exposure to intimate partner violence impacts children's school attendance and achievement.[164] Importantly, the study found that children exposed to intimate partner violence—the indirect maltreatment group—had the highest absence rates and suffered the lowest academic achievement levels, including in reading and mathematics.[165]

In addition to low attendance and academic achievement, exposure to family violence has a deleterious effect on school discipline. Children exposed to family violence are at higher risk for "internalizing and externalizing problems[,]"[166] which may manifest in school discipline related difficulties, including higher incidences of suspensions.[167] Further, children exposed to maternal IPV were "almost twice as likely" to be suspended than their counterparts.[168]

3. Intergenerational Impact and Revictimization

Children exposed to family violence in their homes are at increased risk of suffering the consequences of that abuse for a lifetime. "Traumatic events in childhood can be emotionally painful or distressing and can have effects that persist for years[,]"[169] and can have intergenerational impact.[170] That is, there is an increased risk that children who are either the victim of abuse or exposed to abuse in their home will, themselves, become abusers when they reach adulthood.[171] This is especially true if the abused parent is the mother.[172] One

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[164] Lisa R. Kiesel et al., *The Relationship Between Child Maltreatment, Intimate Partner Violence Exposure, and Academic Performance*, 10 J. PUB. CHILD WELFARE 434, 438 (2016).

[165] *Id*. at 448 ("All groups of children with adverse experience of child maltreatment and/or IVP exposure—whether alone or in combination—performed significantly worse than the matched general population group . . . on standardized reading and math achievement tests. Although the IPV group fared consistently the worst across both reading and math achievement . . . .").

[166] Alysse M. Loomis, *Pathways from Family Violence Exposure to Disruptive Behavior and Suspension in Elementary School*, 17 J. FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 21, 24 (2020).

[167] *Id*. at 23.

[168] *Id*.; *see also* Michelle P. Desir & Canan Karatekin, *Interpersonal Factors Influencing Risk for Revictimization in Two Samples of Young Adults*, 17 J. FAM. TRAUMA, CHILD CUSTODY & CHILD DEV. 89 (2020).

[169] *Preventing Adverse Childhood Experiences: Leveraging the Best Available Evidence*, CDC: NAT'L CTR. FOR INJURY PREVENTION & CONTROL 7 (2019), https://www.cdc.gov/violenceprevention/pdf/preventingACES.pdf.

[170] M.K.M. Lunnemann et al., *The Intergenerational Impact of Trauma and Family Violence on Parents and Their Children*, 96 CHILD ABUSE & NEGLECT 1, 10 (2019).

[171] *Id. But see* Marinus H. van IJzendoorn et al., *Annual Research Review: Umbrella Synthesis of Meta-Analysis on Child Maltreatment Antecedents and Interventions: Differential Susceptibility Perspective on Risk and Resilience*, 61 J. CHILD PSYCH. & PSYCHIATRY 272, 274 (2019) (reporting that studies examining intergenerational abuse vary regarding levels of risk; however, "recent studies support the existence of intergenerational transmission of abuse, though transmission rates have varied" depending upon the study design and participants).

[172] Lunnemann et al., *supra* note 170, at 10.

hypothesis regarding intergenerational transmission is that the child is exposed to violence as a model of how to deal with interpersonal conflict.[173]

Further, exposure to abuse as a child may manifest in other ways in adulthood, including increased risk of revictimization.[174]

> [M]others who have experienced [child abuse and neglect] during their youth have an increased risk of experiencing [intimate partner violence (IPV)] during adulthood and the more IPV these mothers experience, the more trauma symptoms they have. This shows that it is also important that practitioners help the family to stop the violence and create safety, because this violence perpetuates the trauma symptoms of mothers, which in turns affects their children.[175]

This is particularly worrisome as women (mothers) are at a significantly greater risk of becoming victims of family abuse than men.[176]

Despite the documented damage that indirect maltreatment has upon a child exposed to family violence, many courts strictly adhere to the notion that only direct application of violence to the child will prevent a return to the habitual residence. Consequently, an order of return sends the child back into the arms of the child's abuser, which poses its own risk to the child. The post-separation environment does not provide the safe haven many courts imagine exists, for either the taking parent or the child.

E. Effect of Returning the Child to the Habitual Residence

This section focuses on two possible scenarios of returning a child to the habitual residence: return to the abusive parent directly or return to the habitual residence with the taking parent.[177]

1. Returning the Child

Returning a child to the care of the abusive parent in the habitual residence amplifies the risk to the child. The average age of an internationally abducted

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[173] IJzendoorn, *supra* note 171, at 274.

[174] Desir & Karatekin, *supra* note 168.

[175] Lunnemann et al., *supra* note 170, at 10.

[176] Melissa Kimber et al., *The Association Between Child Exposure to Intimate Partner Violence (IPV) and Perpetration of IPV in Adulthood – A Systematic Review*, 76 CHILD ABUSE & NEGL. 273 (2018).

[177] There are other possible return scenarios, including return to extended family members or social services, among others. These options are vested with their own intricacies and pitfalls, which fall outside the scope of this Article.

child is under six years old.[178] Children under six tend to be at heightened risk of abuse and neglect compared to their older counterparts.[179] Moreover, it is well-documented that there is a heightened risk of direct child maltreatment in a home experiencing family violence.[180] The Reflection Paper notes a correlation between thirty to sixty percent of co-occurring spousal and child abuse: "This means that children who are part of a family where adult domestic violence is found are at greater risk of being exposed to physical harm themselves."[181] Additionally, if the left-behind parent to whom the child is returned has untreated substance abuse issues, the child is at nearly three times the risk of direct abuse and four times the risk of neglect than children with parents without substance abuse issues.[182] Moreover, it is essential to understand that the risk to the child does not abate if the previously targeted parent is not in the home. Maintaining a fractured view of the abusive partner and the safe parent denies the co-occurrence phenomenon, the Family Systems Theory of abuse, and the complex psychology of the abusive father.[183]

For example, one study found that nearly fifty percent of men who had previously engaged in domestic violence still had a heightened risk of committing child abuse in a post-separation household.[184]

An abusive parent may not use direct violence to continue to negatively affect the child, especially if that parent uses coercive control as a mechanism of domination. "Child contact provides coercive control-perpetrating fathers with opportunities to continue their abuse of children and ex-partners."[185] Continued abuse is accomplished through a variety of methods, including dangerous fathering ("intrusive, threatening and/or punishing"), admirable fathering ("appear[ing] as caring, concerned, indulgent, and/or vulnerable,"

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[178] Janet Chiancone et al., *Issues in Resolving Cases of International Child Abduction by Parents*, OFF. JUV., JUST. & DELINQ. PREVENTION BULL., (Dec. 2001), https://www.ojp.gov/pdffiles1/ojjdp/190105.pdf.

[179] WHO, GLOBAL STATUS REPORT ON PREVENTING VIOLENCE AGAINST CHILDREN 8 (2020) [hereinafter GLOBAL STATUS REPORT].

[180] Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 VIOLENCE AGAINST WOMEN 115 (2005).

[181] *Reflection Paper*, *supra* note 134, ¶ 20.

[182] Kelly Kelleher et al., *Alcohol and Drug Disorders Among Physically Abusive and Neglectful Parents in a Community-Based Sample*, 84 AM. J. PUB. HEALTH 1586, 1588 (1994).

[183] Stephanie Holt, *Post-Separation Fathering and Domestic Abuse: Challenges and Contradictions*, 24 CHILD ABUSE REV. 210, 211 (2015).

[184] Emily J. Salisbury et al., *Fathering by Partner-Abusive Men: Attitudes on Children's Exposure to Interparental Conflict and Risk Factors for Child Abuse*, 14 CHILD MALTREATMENT 232, 240 (2009).

[185] Emma Katz et al., *supra* note 151, at 312.

including to involved professionals or authorities), and omnipresent fathering ("appear[ing] anywhere, anytime").[186]

2. Returning the Child with the Taking Parent

Returning the child to the habitual residence in the care of the taking parent does little to moderate the harm to the child due to the increase in custodial parental stress associated with return. Parenting stress related to family violence translates to negative consequences for the children of the stressed parent.[187] Post-traumatic stress response in women who have suffered intimate partner violence is strongly related to their children's mental health problems—"mothers who are struggling with their own reactions to their victimization may be less able to regulate their response to their children. . . ."[188] Further, coercive controlling ex-partners' "manipulat[ion of] both children and professionals," through skillful "lying, threatening, charming, playing the victim or the hero" may also increase stress and anxiety on the protective parent.[189]

Finally, post-separation escalation of violence, including homicide or filicide, is well-documented. Coercively controlling abusers may become more violent due to a perceived loss of control over their former partner and children.[190] This risk may persist for years after separation.[191] Further, although a rare occurrence, the risk factors for filicide and familicide include many of the common scenarios in grave risk cases: prior history of abuse or threats of harm; separation; stalking behaviors; mental health struggles; substance abuse history; prior suicide attempts; escalation of violence; prior agency involvement; and the target's own "intuitive sense of fear."[192] Existence of prior abuse, mental health struggles, substance abuse issues, and prior agency involvement is considered a particularly lethal combination of factors.[193] It is important to note that the vast majority of the perpetrators of filicide are fathers acting in retaliation to punish

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[186] *Id*. at 316–20.

[187] Huth-Bocks & Hughes, *supra* note 157, at 248.

[188] Carolyn A. Greene et al., *Psychological and Physical Intimate Partner Violence and Young Children's Mental Health: The Role of Maternal Posttraumatic Stress Symptoms and Parenting Behaviors*, 77 CHILD ABUSE & NEGLECT 168, 176 (2018).

[189] Katz et al., *supra* note 151, at 312.

[190] Jennifer L. Hardesty et al., *Coparenting Relationship Trajectories: Marital Violence Linked to Change and Variability After Separation*, 31 J. FAM. PSYCH. 844, 845–46 (2017).

[191] *Id*. at 846.

[192] Peter G. Jaffe et al., *Paternal Filicide in the Context of Domestic Violence: Challenges in Risk Management for Community and Justice Professionals*, 23 CHILD ABUSE REV. 142, 144 (2014).

[193] Laura Olszowy et al., *Effectiveness of Risk Assessment Tools in Differentiating Child Homicides from Other Domestic Homicide Cases*, 10 J. CHILD CUSTODY 185, 187–88 (2013).

the taking parent.[194] Consequently, sending the taking parent back into the orbit of the abusive parent may have dire consequences for the child and the taking parent.

III. EXPOSURE TO FAMILY VIOLENCE CASE ANALYSIS

Many courts do not consider acts of violence against one parent or family member as an act of abuse against the child, which may defeat the grave risk defense. This view propels the child back into the arms of the abusive parent, which may expose the child to further abuse and may exacerbate the child's already-existing trauma. The solution to these issues is opening the aperture of the grave risk defense to explicitly include exposure to family violence: a risk that the child would be exposed to violence or abuse directed against themself, or against a parent, sibling, or household family member. In this section, the effectiveness of the reframed defense is exemplified through case analysis, followed by a discussion of undertakings.

The following cases exemplify the current split in U.S. courts regarding family violence/indirect maltreatment cases. The discussion herein examines the facts of the cases, but through the lens of the proposed expanded defense, which includes exposure to family violence. The case analysis incorporates undertakings as a complicating factor in determining the risk to the child.

A. Garcia v. Duarte Reynosa

Samy Hamilton Herrarte Garcia, the father, and Glercy Rosario Duarte Reynosa, the mother, are the unmarried parents of two children: S.C., age six; J.A., age three; and A.E., now deceased. On November 24, 2019, the father filed a verified petition in federal court for return of the children from Washington, alleging the mother had wrongfully removed them from their habitual residence of Guatemala on or about February 27, 2019.[195] The father alleged in the petition that the mother absconded with the children while he was at work, but left him a note claiming she left "because she is 'young' and one 'wants material things.'"[196] The father claimed that he and his brother sent text messages to the mother asking for her whereabouts and whether she intended to travel to her parents' home in the United States. The mother allegedly denied plans to leave

[194] *Id*. at 186–87 (noting that ninety percent of retaliatory filicide cases are perpetrated by men).

[195] Verified Petition for Return of Children Under the Convention on the Civil Aspects of International Child Abduction, *In re* Garcia v. Duarte Reynosa (*Garcia I*), No. 2:19CV01928, 2019 WL 8105850, at *1 (W.D. Wash. Nov. 24, 2019).

[196] *Id*. ¶ 3.8.

Guatemala.[197] The father alleged that he remained in sporadic contact with the mother through March 23, 2019, but the mother never revealed her location.[198] On March 21, 2019, the father said he learned that the mother and the children were staying at the maternal grandparents' home in Washington; the father contacted the Central Authority in Guatemala and submitted an application under the Hague Child Abduction Convention seeking the return of the children.[199] On April 22, 2019, the father sought voluntary return through the OCI; the mother declined and limited contact between the father and the children. The father claimed he learned that the mother applied for asylum in the United States. The father affirmatively denied ever harming the mother. The father stated he tried to communicate directly with the mother and asked her to return to Guatemala, but she refused.[200]

In a separate, but concurrent, filing, the father sought an interim order to: (1) preclude the mother from removing the children from King's County, Washington, pending hearing on the application for return, (2) have daily video contact with the children, (3) have the mother provide the contact information for any school or daycare the children attend, (4) have the mother post a cash bond, (5) transfer physical custody of the children to the father if he is personally present in Washington state, (6) have the mother pay for all of the father's costs and expenses, and (7) order the mother to appear at the hearing.[201]

The district court held an initial hearing on the petition for return on January 22, 2020.[202] The court considered the request for interim orders. The mother did not object to remaining in King's County with the children, allowing the father to have daily video visits with the children, and giving the father access to the school and daycare information—consequently, the court granted these requests. However, the mother did object to transferring physical custody of the children to the father upon his arrival in Washington. The court agreed, stating that "there are still material questions of fact regarding [the mother's] very serious allegations of physical abuse. As a result, the Court cannot conclude that [the father] is likely to succeed on the merits of his case."[203] The court thereafter

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197 *Id*. ¶ 3.10.

198 *Id*. ¶ 3.12.

199 *Id*. ¶¶ 3.14–3.15.

200 *Id*. ¶¶ 3.16–3.20.

201 *Id*. ¶¶ 8.1–8.9.

202 Garcia v. Duarte Reynosa (*Garcia II*), No. C19-01928-RAJ, 2020 WL 363404, at *1 (W.D. Wash. Jan. 22, 2020).

203 *Id*. at *2.

denied the father's request for physical custody and the request for bond. A trial was set for February 10, 2020.[204]

The trial commenced as scheduled and lasted three days. The mother testified to multiple acts of abuse by the father. The first instance of abuse occurred in 2013 when the mother, while pregnant with S.C., was hit "many times with his fist on her face, body, and legs" by the intoxicated father, resulting in bruising throughout her body.[205] The second instance occurred in June 2015 when the intoxicated father yelled at the mother—who was then seven-months pregnant with A.E.—and threw a broomstick at her as she attempted to escape the situation. The broomstick hit her on the leg, causing her to fall. S.C. was present during this incident. The mother then went into early labor and A.E. was born shortly after, critically premature. The child died one week later.[206] Third, in late 2015, the couple argued because the mother failed to fill the father's car with gasoline, as he had instructed. The father hit the mother on the head with the handle of a gun. S.C. was present for the incident. The mother fled the home and sought refuge with her mother-in-law, who cleaned the wound and asked the mother to not speak about the incident with the father. The mother provided a photograph of the scar that resulted from the injury.[207] Fourth, the mother described an incident where the father was intoxicated and threatened the mother. She ran out of the family home, carrying S.C., while the father gave chase and shot his gun into the air, laughing at her.[208] The fifth incident occurred in April 2018 when, following another violent exchange, the mother took both children and went to her sister's home.[209] She obtained a restraining order against the father.[210] The father contacted the mother, despite the restraining order, and asked her to return to the family home, assuring her that he would change.[211] The mother returned to the family home.[212] The sixth incident occurred in February 2019 when the father came home intoxicated and the mother confronted him about being unfaithful.[213] The father shoved the mother while S.C. pleaded with the father to stop abusing the mother, which he did.[214]

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204 *Id*.
205 *Garcia III*, Nos. 2:19-cv-01928-RAJ, 2020 WL 777247, at *1 (W.D. Wash. Feb. 18, 2020).
206 *Id*. at *2.
207 *Id*.
208 *Id*.
209 *Id.*
210 *Id.*
211 *Id.*
212 *Id*.
213 *Id.*
214 *Id.*

S.C. was visibly scared and was crying during the incident.[215] The father denied the incidents described by the mother, referring to them as "self-serving."[216] He argued that there was no evidence that he physically harmed the children.[217]

The court's analysis focused upon the credibility of the mother and the scope of the father's assaults. As to the former, the court found the mother's testimony "highly credible[,]" and noted that much of what the mother stated was corroborated by other evidence and testimony.[218] As to the latter, the court found that the abuse "was primarily directed at [the mother], not the children."[219] The court credited the three occasions where S.C. was present during the abuse, but noted "there is no evidence that [S.C.] was harmed during any of these altercations."[220] The court analogized this case to other cases that held that abuse directed at the taking parent is insufficient to establish a grave risk defense.[221] Further, while the court did not "discount the potential for psychological harm to the children[,]" it determined it could not reach that conclusion because there was no expert testimony to "assess the effects of witnessing the abuse."[222] Ultimately, the court said its "hands are tied" and issued an order of return.[223] The motion for reconsideration was denied.[224]

This case is an exemplar of why exposure to family violence requires definition in foundational texts. The court's conclusion that the children were not targeted by the father is erroneous because families operate as systems—the father's abuse of the mother *is* abuse of the children. The mountain of social science literature supports this conclusion. S.C.'s and J.A.'s risk of abuse in the absence of the protective parent may be fifty percent higher than children from non-abusive households.[225] Because the target of violence in the household was the mother, the children are at a much higher risk for revictimization later in life. Both children are at risk of significant psychological, academic, and medical consequences because of their exposure to their mother's beatings. What is particularly chilling in this case is the presence of the toxic combination of

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215 *Id*.

216 *Id.* at *3.

217 *Id*. at *2–3.

218 *Id*. at *4.

219 *Id*.

220 *Id*.

221 *Id*.

222 *Id*.

223 *Id*.

224 *Garcia v. Duarte Reynosa* (*Garcia IV*), Nos. 2:19-CV-01928-RAJ, 2020 WL 978355, at *1 (W.D. Wash. Feb. 28, 2020).

225 Salisbury et al., *supra* note 184, at 240.

factors which raise the specter of filicide: prior history of abuse, substance abuse, and prior agency involvement. The fact that an expert did not testify at the trial does not erase the decades of expert scholarship which overwhelmingly supports these conclusions.[226] Further, if either ICARA or the Hague Convention (or both) defined grave risk to explicitly include consideration of the abuse of another family member as a grave risk to the child, the court would likely have found "its hands" unbound.

It is notable that the *Garcia* court sits in the Ninth Circuit. As described previously, the Ninth Circuit follows the *Blondin* rule; however, undertakings were not ordered in this case. This is likely because the court did not find a grave risk to the children. Regardless, as discussed in the next case analysis, the use of an undertakings analysis in family violence cases does not provide protection to children returned to the habitual residence.

B. Saada v. Golan[227]

Isacco Jacky Saada, the father, and Narkis Aliza Golan, the mother, are the married parents of one child: B.A.S. The family lived in Milan, Italy, prior to the instant action.[228] Before and after B.A.S.'s birth, the couple had a violent and unstable relationship. The father's abuse of the mother was pervasive and, at times, severe. Fifteen such accounts were cited by the trial court, including: "smashing" the mother in the face, consistently hitting her, pulling her hair, dragging her on the ground, sexually assaulting her, threatening her, and committing acts of verbal violence.[229] Many of these incidents occurred while the mother was pregnant with B.A.S. and continued after his birth.[230] Some attacks occurred while B.A.S. was present.[231] On July 18, 2018, the mother flew to the United States so she could attend her brother's wedding.[232] She did not return to Italy and, instead, moved into a confidential domestic violence shelter.[233] In September 2018, in Milan, the father initiated a criminal complaint

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226 *See generally* Amy Rublin, *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn from Integration and Capital Punishment Case Law*, 19 DUKE J. GENDER L. & POL'Y 179 (2011) (analyzing how social science comes to the attention of the courts and how it is utilized by judges in their decisions).

227 There are four cases in the *Saada* line of decisions: two district court decisions, each followed by appellate court decisions. These cases are designated chronologically as *Saada I – Saada IV*.

228 Saada v. Golan (*Saada I*), No. 18-CV-5292, 2019 WL 1317868, at *1 (E.D.N.Y. 2019).

229 *Id.* at *4–11.

230 *Id.* at *5–11.

231 *Id.* at *2, *7–11.

232 *Id.* at *10.

233 *Id.* at *3.

against the mother, applied for a Hague return petition, and filed for custody of their son in Italian court.[234]

The Hague trial began on January 7, 2019, and lasted nine days.[235] Both sides called witnesses, including four expert witnesses.[236] The mother asserted the return petition should be denied based upon a grave risk of harm defense.[237] The court concluded the mother established, by clear and convincing evidence, that B.A.S.'s return to Italy would expose him to a grave risk of harm or an intolerable situation.[238] However, the district court sits in the Second Circuit and, therefore, applied the *Blondin* rule: "[It] *must* consider whether there are 'any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with the child's repatriation.'"[239] The undertakings the court considered included: the father's offer to pay mother $30,000 USD for housing, financial support, and legal fees; the father's promise to adhere to a "stay away" order from the mother; and the father's agreement to "pursue dismissal" of the criminal abduction charges pending in Italy.[240] The mother, "under protest,"[241] augmented the father's list with an agreement granting her a temporary full custody order of B.A.S., an agreement to use the evidence introduced at the Hague trial in the Italian custody proceeding, therapy for both parents, and the father's aid in securing her employment in Italy.[242] The trial court determined that ameliorative measures offered by the father and supplemented by the mother sufficed to guarantee safety for the child and ordered return.[243] The mother appealed that decision, claiming the proposed undertakings did not sufficiently ameliorate the grave risk of harm of returning the child.[244]

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234 *Id.* at *4.

235 *Id.* at *1.

236 *Id.*

237 *Id.* at *17. The mother also raised the issue of habitual residence, asserting the couple did not share a settled intent to fix Italy as B.A.S.'s habitual residence. The court disagreed. *Id.* at *15–16.

238 *Id.* at *18.

239 *Id.* (citing *Blondin II*, 189 F.3d. 240, 248 (2d Cir. 1999)) (emphasis added).

240 *Id.* at *19.

241 Petition for Writ of Certiorari, Saada v. Golan (*Saada IV*), 833 F. Appx. 829 (No. 20-1034) ("Ms. Golan [proposed undertakings] under protest and has maintained throughout the case that no suite of undertakings would be sufficient to ameliorate the grave risk stemming from Mr. Saada's violent temper, inability to appreciate the consequences of his behavior or change it, and disregard for common decency and the law.").

242 *Id.* at *19.

243 *Id.*

244 Saada v. Golan (*Saada II*), 930 F.3d 533, 538 (2d Cir. 2019).

Upon review, the appellate court reversed and remanded the order of return because it determined that the undertakings lacked enforcement capability and were "not otherwise accompanied by sufficient guarantees of performance."[245]

The court remanded the matter back to the district court to revise certain ameliorative terms it imposed "in a manner that would render them directly enforceable[.]"[246] It also suggested that the district court work with the State Department to "[']communicate directly with' the government of Italy to ascertain whether it is willing and able to enforce certain protective measures."[247]

On remand, the district court took the following steps:

> Over . . . nine months, [the court] undertook an extensive examination of the measures available to ensure B.A.S.'s safe return to Italy. With the assistance of the United States Department of State, [the trial court] contacted the . . . Senior Judge of the United States District Court for the District of Maryland and the Representative of the United States Federal Judiciary for the International Judicial Network under the Hague Convention. [The Senior Judge assisted the trial court in correspondence] with the Italian Central Authority and the Italian Ministry of Justice on matters concerning B.A.S., the petitioner and the respondent. . . . [Based upon that communication, the trial court was] confident that the Italian courts [were] willing and able to resolve the parties' multiple disputes, address the family's history and ensure B.A.S.'s safety and well-being.[248]

The court also met with the litigants several times to discuss ameliorative measures, including recently raised concerns that B.A.S. appeared to be on the autism spectrum.[249] Based upon the collected information, the court created a new set of undertakings: (1) the father would pay the mother $150,000.00 *prior* to her return to Italy to cover travel and living expenses for her and B.A.S. to ensure "financial independence" from him and his family; (2) B.A.S. would be evaluated in Italy for autism concerns and the father would cover those costs; (3) the Italian Court would assure a protective order be effected to restrict the father from contacting the mother or B.A.S.; (4) Italian social services would oversee the father's parenting classes and court-ordered behavioral and psychoeducational therapy; (5) the mother would not face criminal charges upon

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245 *Id.*

246 *Id.* at 540.

247 *Id.* at 542.

248 *Saada III*, No. 18-CV-5292, 2020 WL 2128867, at *1 (E.D.N.Y. May 5, 2020).

249 *Id.* at *1, *5.

her return to Italy; and (6) the father agreed to sign a statement not to pursue future criminal or civil actions against the mother, which he submitted to the Italian court.[250] Based upon the newest iteration of undertakings, the trial court, again, announced that the child should be repatriated.[251] The mother appealed, but the appellate court affirmed and the child was ordered to return.[252]

In contrast to *Garcia*, the *Saada* courts recognized the grave risk of harm awaiting B.A.S. upon repatriation. However, it was the undertakings analysis where the *Saada* courts demonstrated a flawed understanding of grave risk based upon exposure to family violence.

First, the courts improperly minimized the damage to B.A.S. which arises from witnessing, and being returned to, an abusive environment. "[T]here was no evidence that the petitioner was violent to B.A.S. . . ."[253] This characterization denies the interconnectedness of families and the resulting damage to B.A.S. from exposure to verbal and physical violence inflicted on his mother. Further, the holding minimizes the effect of the mother's narrowed emotional bandwidth with which she parented due to living in an abusive marriage. "IPV experiences may negatively impact maternal mental health (e.g., PTSD) and parenting behaviors that in turn will be transferred to mother-child interactions, which are well-established influences on children's health and developmental outcomes. . . ."[254] The court's mistake was compounded further when it segregated the mother's safety from B.A.S.'s safety. "Because the respondent is B.A.S.'s primary caretaker, her safety is a factor in the Court's decision. . . . However, it is B.A.S.'s safety and well-being that is paramount—not the respondent's."[255] The safety of B.A.S. is inextricable from the safety of his mother.[256] Post-separation environments provide fertile ground for an escalation of violence, up to and including lethal engagement.[257] The district court may have found "sufficient guarantees of performance" through the Italian court's order of protection and involvement of social services in overseeing parenting classes and therapeutic intervention;[258] however, elements of coercive control do not evaporate with judicial intervention. This is especially true with an "admirable father," who uses charm and vulnerability to manipulate

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250 *Id.* at *3–5.
251 *Id.* at *6.
252 *Saada IV*, 833 F. Appx. 829, 831 (2d Cir. 2020), *petition for cert. filed* (Jan. 26, 2021) (No. 20-1034).
253 *Saada III*, 2020 WL 2128867, at *4.
254 Ferrajao, *supra* note 149, at 5.
255 *Saada III*, 2020 WL 2128867, at *4.
256 *See* Pollastro v. Pollastro, [1999] 45 R.F.L. (4th) 404 (Can. Ont. C.A).
257 *Saada III*, 2020 WL 2128867.
258 *Id.*

professionals and authorities into believing that he is a safe and appropriate parent.[259]

Next, the district court incorrectly grounded a sense of safety for the mother and B.A.S. based upon vicinity. As to the mother, the court stated, "Ms. Golan and Mr. Saada will no longer be living together, and eliminating the element of proximity will reduce the occasions for violence."[260] As for B.A.S., the court stated, "[the] risk [of harm to the child] is greatly reduced when the parties are not together."[261] The court also relied upon the representations of the Italian court that its protective order would restrict the father from "going near [the mother] or B.A.S."[262] Unfortunately, in post-separation environments, lack of access may increase the risk for violence. "Women who divorce [coercive/controlling/violent] abusers face increased risk of harm because separation is considered a threat to an abuser's control over his partner and children."[263] Further, despite a protective order issued by the Italian government, protection from future violence and order violations is compromised by the father's history of violence, the ongoing co-parenting relationship, and the mother's financial reliance upon him.[264] Offenders with a prior history of violence who have an ongoing relationship with the target parent (in this case, sharing a child and financial ties) are "significantly more likely to violate [protective orders] and continue the use of violence and abuse."[265]

Accordingly, the use of undertakings in the *Saada* case and in grave risk of harm cases, generally, should be abolished as unworkable in purpose, scope, and enforcement.

IV. GRAVE RISK AND UNDERTAKINGS

Saada v. Golan is currently on petition to the U.S. Supreme Court on a Writ of Certiorari to review the ruling of the Second Circuit and resolve the following question: "Whether, upon finding that return to the country of habitual residence places a child at grave risk, a district court is *required* to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave

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259 Katz et al., *supra* note 151, at 317.

260 *Saada I*, No. 18-CV-5292, 2019 WL 1317868, at *19 (E.D.N.Y. 2019).

261 *Saada III*, 2020 WL 2128867, at *2.

262 *Id.* at *4.

263 Hardesty et al., *supra* note 190, at 845–46.

264 Reinie Cordier et al., *The Effectiveness of Protection Orders in Reducing Recidivism in Domestic Violence: A Systematic Review and Meta-Analysis*, 22 TRAUMA, VIOLENCE, & ABUSE 804, 824–25 (2019).

265 *Id.* at 824.

risk finding."[266] The purported reason for courts to engage undertakings as a way to safely return a child is to comport with the spirit of the Convention—to ensure the prompt return of the child to the habitual residence.

> Given the strong presumption that a child should be returned, many courts, both here and in other countries, have determined that the reception of undertakings best allows for the achievement of the goals set out in the Convention while, at the same time, protecting children from exposure to grave risk of harm.[267]

This reasoning is flawed.

A. Purpose, Scope, and Enforcement

The principal objectives of the Convention are stated in the Preamble.

> The States signatory to the present Convention,
> Firmly convinced that the *interests of children are of paramount importance in matters relating to their custody*,
> *Desiring to protect children internationally from the harmful effects of their wrongful removal or retention* and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
> Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions[.][268]

The stated purpose, which forms the bedrock of the undertakings arguments, crumbles under the slightest pressure of meaningful analysis. Undertakings analyses claim to meet the laudable goals of the Convention; instead, they undermine them. Further, undertakings cannot be crafted with the dynamic breadth necessary to effectively protect a child from harm arising from repatriation. Finally, a court imposing undertakings lacks any meaningful enforcement mechanism and should therefore not relinquish its authority under the guise of "sufficient guarantees of performance."[269]

1. Purpose

The purpose of the Convention is made clear in its text: to protect children from the harmful effects of abduction by ensuring their prompt return to their habitual residence, unless doing so would expose the child to a grave risk of

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266 Petition for Writ of Certiorari, *supra* note 241 (emphasis added).
267 *Walsh II*, 221 F.3d. 204, 219 (1st Cir. 2000) (emphasis added).
268 Hague Convention, *supra* note 1, pmbl.
269 *Saada III*, 2020 WL 2128867, at *1.

harm or intolerable situation. The *Blondin* rule claims the goals of the Convention can only be achieved if courts approach their task with a sense of comity.[270] However, fealty to this concept can blind a court to the explicit textual goals of protection, discretion, and expedience.

a. Comity

Blondin states comity requires undertakings. "[Undertakings must be considered because] [i]n the exercise of comity that is at the heart of the Convention . . . we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it."[271] This approach makes two errors: (1) it assumes comity is unidirectional, and (2) it creates an untenable quandary where courts are required to affirmatively state that the habitual residence cannot protect a child.

Removal courts in the United States are, rightfully, concerned with respecting the international enforcement of the Convention. "[T]he Convention is premised on mutual trust between participating nations. Signatories trust each other to consider a child's best interest when adjudicating custody, to protect children who need protection, and to decide cases fairly when only one litigant is a national."[272] Thus, the United States needs to rely upon its treaty partners to protect its children when abducted abroad and return those children to the United States when it would not pose a grave risk to the child to do so. It follows, therefore, that courts in the United States are endowed with the same trust from its international partners—when the United States determines that returning a child poses a grave risk of harm, it should not be required to do so. This notion of comity is appropriate, as well as in keeping with the plain language of the Convention itself.

Undertakings require a court to analyze whether international partners can protect a child. This is an untenable situation, as "it certainly does not further comity interests to have the United States courts openly criticizing their foreign domestic peers."[273] Moreover, this puts the child's welfare in competition with national diplomacy[274]—a competition without a winner.

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[270] *Blondin I*, 189 F.3d 240, 248–49 (2d Cir. 1999).

[271] *Id.*

[272] Weiner, *supra* note 67, at 285.

[273] Brief for Frederick K. Cox International Law Center as Amicus Curiae Supporting Petitioner, *Saada IV*, 833 F. Appx. 829 (No. 20-1034).

[274] *Id*. (quoting Rhona Schuz, *The Doctrine of Comity in the Age of Globalization*, 40 BROOK. J. INT'L L. 33, 68 (2014) ("[I]t is morally indefensible to sacrifice the interests of a particular child for the sake of diplomatic relationships or even in the hope that this will prevent other children from being abducted.")).

b. Protection from Harm and Discretion to Return

An explicit purpose of the Convention is to protect children from harm. Accordingly, the Convention provides defenses to return, providing "that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected."[275] If a court determines that a defense meets its burden, the Convention endows the court with discretion to return or retain the child because the harmful effect to the child could be in the *return*, not the *removal*. "While the remedy of return works well if the abductor is a non-custodial parent, it is inappropriate when the abductor is a primary caretaker who is seeking to protect herself and the children from the other parent's violence."[276] The *Blondin* rule devalues this protective element in the Convention by requiring courts to prognosticate what may be required in another country to protect children from a dangerous parent. Even if this crystal ball approach worked in conjunction with officials from the habitual residence, the approach likely places both the taking parent and child in peril because of the unique psychological and environmental factors described thus far. It is unlikely that an appropriately tailored and effective plan for protection can be achieved, which has catastrophic consequences.

c. Prompt Adjudication

The Convention places a premium on prompt adjudication of the petition. The preamble and the first two articles of the Convention mention that the petition for return must be handled with alacrity. However, undertakings analyses delay return. For example, in the *Saada* case, the delay for appealing the undertakings analysis was compounded by the district court's nine-month effort to cobble together a set of undertakings that would satisfy the appellate court. Alternatives to undertakings could be safe harbor or mirror orders. However, those measures are costly and time-consuming.[277]

A concerning aspect of the delay of undertakings is that the child is likely to remain in the removal state during the process of investigating and crafting the return plan. The anxiety and stress caused by such a process can exacerbate the already-existing trauma.[278] This Article does not suggest that an undertakings

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[275] *Explanatory Report*, *supra* note 71, ¶ 25.

[276] Weiner, *supra* note 67, at 279.

[277] Roxanne Hoegger, *What if She Leaves – Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 BERKELEY WOMEN'S L.J. 181, 198–99 (2003).

[278] Louie Talitha Claasen & Gloudina Maria Spies, *The Voice of the Child: Experiences of Children, in*

analysis should be rushed; rather, it argues that if there is a finding of grave risk of harm by clear and convincing evidence, the petition should be denied.

2. Scope

A finding of grave risk of harm is an acknowledgement that returning the child to his habitual residence exposes him to "situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation."[279] Logistically, the removal court would have to consider with whom the child will be returning to the habitual residence, where the child will stay upon return, and how the child's safety will be assured once returned. The court would have to demonstrate an understanding of the psychological state and potential risky behavior of the abusive left-behind parent to fashion reparative measures to meet the unique safety challenges of that parent and child. As was ordered in *Saada v. Golan*, common undertakings include therapy for the abusive parent, financial support for the taking parent, and protective orders for the taking parent and child. However, "[there is a] misunderstanding [which] underlies the assumption that strict measures, carefully crafted and supervised by an authority in the country of return, could be effective protection."[280] These errors are discussed in turn.

a. Therapy

Generic "batterer's intervention programs" have varying levels of efficacy.[281] Programs that incorporate substance abuse and trauma components tend to have better outcomes, but an overarching picture of reliable treatment models has not come into focus.[282] This is partly because offenders' responses to treatment vary widely.[283] Accordingly, simply crafting an ameliorative model of "therapy" or "parenting" may be wholly ineffective at countering the danger to which the child is being returned. There is also a heightened risk if the wrong type of program is ordered because some programs are "linked with unwanted

Middle Childhood, Regarding Children's Court Procedures, 53 SOC. WORK 74, 83 (2017).

[279] *Blondin IV*, 238 F.3d 153, 162 (2d Cir. 2001).

[280] Brief for Individuals and Organizations Advocating for Victims of Domestic Violence (Sanctuary for Families, Inc. et al.) as Amicus Curiae Supporting Petitioners, *Saada IV*, 833 F. Appx. 829 (No. 20-1034) [hereinafter Brief for *Saada IV*].

[281] Günnar Karakurt et al., *Meta-analysis and Systematic Review for the Treatment of Perpetrators of Intimate Partner Violence*, 105 NEUROSCIENCE & BIOBEHAV. REV. 220, 220–21 (2019).

[282] *Id*. at 227.

[283] Pablo Carbajosa et al., *Responsive Versus Treatment-Resistant Perpetrators in Batterer Intervention Programs: Personal Characteristics and Stages of Change*, 24 PSYCHIATRY, PSYCH. & L. 936, 936 (2017).

consequences such as the normalization of aggressive behaviors" among participants.[284]

b. Financial Support

Survivors of family violence flee their abusers to protect their children, end violence, and end the control the perpetrator has over their lives.[285] However, returning taking parents to the habitual residence and making them financially dependent upon their abuser creates the parental stress cautioned against in Part II. [286] Further, this situation puts the abuser back in control of the survivor's daily life, including the very roof over the survivor and the child's heads. Financial dependence upon the abuser "significantly limits victims' options and resources for safety and support."[287] Making the survivor dependent on the abuser hardly meets the definition of an "ameliorative measure."[288]

c. Protective Orders

Although "[s]ome victims may only be safe a continent away from their abusers, regardless of the conditions that courts could impose for their safety[,]"[289] a common method of judicial intervention to protect abuse victims and their children is the use of protective orders.[290] The efficacy of protective orders reveals a complicated measure of violations, deterrence, and sense of safety.[291] Not surprisingly, "there is a variation between victim report surveys of [protective order] violations and studies relying solely on violation reporting data from police or court sources; victim studies are more likely to show higher rates of reported reabuse . . . ."[292] While some studies indicate a reduction of violence after a protective order is issued, others show an increase in violence, including homicide.[293] Accordingly, understanding the contextual variables for effective protection is essential. In grave risk/undertakings cases, the most frequent reoffenders include perpetrators with prior arrests and a history of

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284 Karakurt et al., *supra* note 281, at 220.

285 *See* Elisa M. Fisher & Amanda M. Stylianou, *To Stay or the Leave: Factors Influencing Victims' Decisions to Leave a Domestic Violence Emergency Shelter*, 34 J. INTERPERS. VIOLENCE 785 (2019).

286 *See supra* Section II.E.2.

287 Fisher & Stylianou, *supra* note 285, at 786–87.

288 *See* Hoegger, *supra* note 277, at 196–97.

289 Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 680 (2000).

290 Cordier et al., *supra* note 264, at 1.

291 *Id.* at 2.

292 *Id.* (citing T.K. Logan et al., *Protective Orders: Questions and Conundrums*, 7 TRAUMA, VIOLENCE & ABUSE 175 (2006)).

293 *Id.* at 2–3.

violence.[294] Moreover, protective orders have a higher potential for efficacy if accompanied by the threat of arrest.[295] This requires the removal court to rely on the habitual residence to enforce its protective order with the threat of incarceration. As discussed earlier, that is an unlikely scenario.

3. Enforcement

Enforcement outside the jurisdictional reach of the removal court is a legal impossibility. Courts following the *Blondin* rule rely on delegating enforcement to the foreign court under the theory of "sufficient guarantees of performance." However, even with guarantees from the habitual residence, *performance* is in the hands of the abuser, and the sincerity with which undertakings are entered is doubtful.

"A 2003 survey of cases imposing conditions on abusers found that those addressing violence (including some included in court orders imposed in the country of return) were broken *in every case*."[296] Local authorities are likely to disregard the measures implemented for the protection of the returning parent and child as having no import or effect.[297] Disregarding protective measures is potentially a deadly issue for mothers returning with protective orders providing for no contact with the abusive father. The efficacy of such an order is linked to the threat of arrest;[298] however, the decision to arrest is, presumably, outside the purview of the local court and, certainly, outside the reach of the return court.

Enforcement of financial undertakings is similarly untenable, even if ordered prior to return. The cost of housing and daily needs is speculative, while the cost to cover legal fees is in the realm of fortune-telling. If the payment is exhausted, the survivor parent is left as a refugee in the habitual residence—without capability to work, without family support, and without means to protect the child, all while the pivotal custody battle is looming.

V. POLICY

The language of Article 13(b) of the Hague Convention indicates that the drafters viewed abducting parents as perpetrators, not victims. However, that

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294 *Id.* at 21.

295 *Id.*

296 Brief for *Saada IV*, *supra* note 280, at 13 (citing INT'L CHILD ABDUCTION CENTRE: REUNITE RSCH. UNIT, THE OUTCOMES FOR CHILDREN RETURNED FOLLOWING AN ABDUCTION 1, 31–33 (Sept. 2003), http://takeroot.org/ee/pdf_files/library/freeman_2003.pdf).

297 INT'L CHILD ABDUCTION CENTRE: REUNITE RSCH. UNIT, *supra* note 296, at 1, 33.

298 Cordier et al., *supra* note 264, at 21.

view has shifted since the adoption of the Convention. Now, there is an undeniable recognition that many taking parents are protective, not criminal. Accordingly, the Convention itself should be amended to comport with that reality. Additionally, or alternatively, ICARA should be amended to explicitly include indirect maltreatment language to act as a guidepost for courts hearing return cases. Finally, the U.S. Supreme Court should grant certiorari in the *Saada* case, and overturn the *Blondin* rule as inconsistent with the plain text and spirit of the Hague Convention and incompatible with international norms. All three of these policy proposals comport with the Convention's text and purpose: they ensure consistent application and analysis, guarantee prompt adjudication, and support the protection of children from harm.

A. Amended: Article 13(c)

Article 13 should be amended to include explicit language which defines both the harm and intolerable situation in the family violence context. As discussed in Section I, the grave risk defense examines both the risk and harm. This Article does not recommend changes to the level of risk the court must find to deny return. The risk must be grave. Otherwise, as the Explanatory Report warns, the Convention risks becoming "a dead letter."[299] The proposed amendment is directed at the harm and the intolerable situation threshold.

Amended Article 13 states, in relevant part:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> . . .
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> c) the court shall consider exposure to family violence or abuse as harmful to a child or as an intolerable situation.

This amended language requires a court to *consider* the exposure to family violence but does not strip the court of its discretion to order return if: (1) the facts of the case do not demonstrate that the risk is grave; (2) the evidence produced does not satisfy the clear and convincing standard; or (3) the court

[299] *Explanatory Report*, *supra* note 71, ¶ 34.

determines that, under Article 18, the child should be returned to the habitual residence. However, the amended language clarifies for the court that indirect maltreatment in the form of family violence can constitute a grave risk of harm or intolerable situation, dispelling the myth that only direct maltreatment may be considered by the court.

The amended language also calls upon the court to consider the unique vulnerability of the children involved in grave risk cases. According to the World Health Organization, each year nearly 300 million children under the age of six are subjected to physical or psychological punishment by their parents or caregivers.[300] Additionally, one in every four children live in a household where the mother is a victim of family violence.[301] Children of this age typically cannot use the Mature Child exception—one of the affirmative defenses to grave risk—to prevent return.[302] The combination of factors—the child's tender age, heightened risk of direct or indirect maltreatment, and inability to plead his/her case directly to the court—paints a particularly grim picture of the child's status. The child's predicament can only be truly appreciated and considered through an expanded definition of grave risk.

This language also aligns with the stated purpose of the Convention—the protection of children—and with other international treaties designed to protect children from harm, the most prominent of which is the United Nations' Convention on the Rights of the Child (UNCRC).[303] The UNCRC developed a framework to secure the personal and political integrity of children worldwide. In relation to children's exposure to violence, the draft report underpinning the UNCRC found the following:

> Between 133 and 275 million children worldwide are estimated to witness domestic violence annually. The exposure of children to violence in their homes on a frequent basis, usually through fights between parents or between a mother and her partner, can severely affect a child's well-being, personal development and social interaction in childhood and adulthood. Intimate partner violence also increases the risk of violence against children in the family, with studies from China, Colombia, Egypt, Mexico, the Philippines and South Africa showing a strong relationship between violence against women with violence against children. A study from India found that

300 GLOBAL STATUS REPORT, *supra* note 179, at 8.

301 *Id.*

302 Hague Convention, *supra* note 1, art. 13.

303 U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC].

> domestic violence in the home doubled the risk of violence against children.[304]

These concerns are reflected in the document's Preamble:

> Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. . .
>
> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".[305]

Enshrined in the UNCRC is a specific protection for children against the damage of exposure to family violence:

> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from *all forms* of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, *while in the care of parent(s), legal guardian(s) or any other person who has the care of the child*.
>
> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.[306]

Even though the United States stands alone as the only country that has not ratified the UNCRC,[307] it should not deafen itself to the international call to protect children from all forms of abuse, including those threats originating inside the child's family.

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[304] U.N. Secretary-General, *Report of the Independent Expert for the United Nations Study on Violence Against Children*, ¶ 47, U.N. Doc. A/61/299, 14–15 (Aug. 29, 2006) (internal citations omitted).

[305] UNCRC, *supra* note 303, pmbl.

[306] *Id.* art. 19 (emphasis added).

[307] UNICEF, *Frequently Asked Questions on the Convention on the Rights of the Child*, https://www.unicef.org/child-rights-convention/frequently-asked-questions.

B. Amended: ICARA § 9002 Definitions and Expert Testimony

The feasibility of amending the Convention is dubious. Amending ICARA, while similarly painstaking, is within the realm of possibility. Accordingly, Section 9002 should be amended to include the following definitions:

1. "Grave risk of harm or intolerable situation" under section 13(b) of the Convention includes the child's exposure to acts of family violence perpetrated by one member of the child's household or family on any other member of the child's household or family.
2. "Act of family violence" means the direct infliction of or exposure to physical abuse, verbal abuse, emotional abuse, sexual abuse, or coercive control of any member of a household by a parent or step-parent.
3. "Exposure to family violence" means being targeted as a direct victim, or seeing, or hearing, or being under the care, custody, or control of a caregiver who is the direct victim of family violence.

These definitions reflect the amassed body of literature that indirect maltreatment is child abuse. The result of these additional definitions would eliminate confusion and inconsistency, domestically and internationally.

Further, ICARA should clarify that expert testimony is not required for a court to make a grave risk determination under these theories. This is not to say that expert testimony is not welcome and, in many cases, may aid the fact finder in understanding these issues. However, potentially returning a child to an abusive home because the taking parent could not afford to pay an expert's fee does not comport with the plain text or the spirit of the Convention. Indeed, the expedited nature of the proceedings, the eased evidentiary requirements, and the establishment of Central Authorities are designed to allow a self-represented litigant to navigate the process with little or no professional help.

C. Elimination of the Blondin *Rule*

Saada v. Golan is before the U.S. Supreme Court on a petition for certiorari.[308] The Court should grant the petition and resolve the split between the district courts regarding the use of undertakings. The Court should strike down the *Blondin* rule as a violation of the plain language of the Convention and contrary to the interests of the children it is designed to protect.

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[308] Petition for Writ of Certiorari, *supra* note 241.

Undertakings fail in purpose, scope, and enforcement. The Supreme Court is uniquely endowed with the power to prevent further growth of this judicially-constructed monster, whose very survival is dependent upon courts breathing life into it. It has no independent source of survival, as it is not mentioned either in the text of the Convention or in ICARA.

The Convention provides two avenues of return in a grave risk case. Assuming the prima facie case is established, the pivotal question is whether a grave risk or intolerable situation awaits the child in the habitual residence. If the answer is no, the child is returned. If the answer is yes, the court can return the child under Article 18. Alternatively, the court can deny the petition. The court *may* consider undertakings, but it is not *compelled* to do so.

The *Blondin* rule, by contrast, provides three avenues of return in a grave risk case. Assuming the petitioner established his prima facie case, the essential question for the court is whether a grave risk or intolerable situation awaits the child upon repatriation. If the answer is no, the child is returned. If the answer is yes, the court *must* engage in an undertakings analysis. If the court's analysis finds that the habitual residence can protect the child, the child is returned. If the court finds that the habitual residence cannot protect the child, the court can still return under Article 18, or it can deny the petition.

Neither the text of the Convention nor ICARA mandate such an analysis. The concept of comity is often offered to support the argument that an undertakings analysis is required. Comity is multilateral in application—the argument that a removal court should trust the habitual residence to protect the child is well-founded, just as the argument that the habitual residence should trust the removal court when it finds a grave risk or intolerable situation precludes the safe return of the child. Striking down the *Blondin* rule in favor of the removal court's *discretion* to engage undertakings in appropriate cases complies with the language and spirit of the Hague Convention and is consistent with the literature describing indirect maltreatment.

CONCLUSION

Family violence is a family systems problem. Indirect maltreatment of children exposes them to an immediate and lifelong risk to their mental and physical health. Accordingly, courts considering a request to return a child under the Hague Child Abduction Convention should consider these consequences, not in the abstract, but in the text of the documents they rely on: the Convention and ICARA. Further, the Convention's defense to return under grave risk should not

be weakened through the mandatory undertakings analysis. Undertakings, as a policy, undermines the purpose of the Convention—it is unwieldy in scope, and unreliable in enforcement. Simply, it revictimizes the children it purports to protect.

Amending the Convention and ICARA with explicit acknowledgment of indirect maltreatment in grave risk cases and eliminating mandatory undertakings analyses will provide consistency and guidance to the judicial officers tasked with this pivotal decision in the life of a child, and will ensure adherence to the Convention's goal: protection of the child. To do nothing would expose a child to a grave risk of harm.